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Supreme Court, U.S.
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In The
Supreme Court of the United States

FRANKLIN C. BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the
Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Third Circuit erroneously exempted pre-indictment contact by a federal prosecutor with a person represented by counsel from binding ethical rules restricting such contact based on its own policy views contrary to federal statute, in conflict with the Second and Ninth Circuit?

2. Whether the Third Circuit erroneously held that suppression of statements obtained by unethical contact with a represented party was an improper remedy, in conflict with the Second and Tenth Circuits?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Franklin C. Brown was the defendant in the district court and the appellant in the Third Circuit.

Respondent the United States of America prosecuted the case in the district court and was the appellee in the Third Circuit.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the District Court for the Middle District of Pennsylvania denying defendant's motion to suppress unethically-obtained recordings of conversations between defendant and a confidential government informant is published at 239 F. Supp.2d 535 and is attached at Appendix B1-B31. The opinion of the Third Circuit affirming petitioner's conviction is published at 595 F.3d 498 and is attached at Appendix A1-A58.

JURISDICTION

The Third Circuit issued its opinion on February 23, 2010. The Third Circuit denied rehearing and rehearing *en banc* on May 6, 2010. App. C1-C2. Justice Alito granted petitioner an extension of time to file this petition through September 3, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The district court had jurisdiction under 28 U.S.C. § 3231.

STATUTE AND RULES INVOLVED

The McDade Amendment, 28 U.S.C. § 530B, provides, in relevant part:

> **§ 530B. Ethical standards for attorneys for the Government**
>
> **(a)** An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that at-

> torney's duties, to the same extent and in the same manner as other attorneys in that State.

At the time relevant to this petition, Pennsylvania Rule of Professional Conduct 4.2, known as the "no-contact rule," provided:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. [1]

Pennsylvania Rule of Professional Conduct 8.4(a) provides:

> It is professional misconduct for a lawyer to:
>
> (a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another * * *.

STATEMENT OF THE CASE

1. This case involves prosecutorial violation of binding professional ethics rules in connection with the investigation, trial, and conviction of petitioner Franklin Brown. The Assistant U.S. Attorney, through an undisclosed proxy armed with a false document, surreptitiously orchestrated and recorded multiple interviews of petitioner without the consent

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[1] On August 23, 2004, Rule 4.2 was amended to substitute "person" for "party" and "to do so by law or a court order" for "by law to do so." PENN. R. OF PROF'L CONDUCT 4.2, historical notes. That change merely clarified the existing interpretation of the Rule and does not affect the issues presented in this petition.

and outside the presence of petitioner's counsel. Such communications violate Pennsylvania Rules of Professional Conduct 4.2 and 8.4 and the federal McDade Amendment, 28 U.S.C. § 530B(a), which makes such rules binding on federal attorneys.

2. From 1968 through 1996, petitioner Brown was the Chief Legal Counsel and then from 1996 through 1999 Vice Chairman of the Board of Rite Aid Corporation. Following a substantial restatement of earnings by Rite Aid in July 2000 and the collapse of Rite Aid's stock prices, the SEC, the FBI, and the U.S. Attorney's Office for the Middle District of Pennsylvania initiated civil and criminal investigations into Rite Aid's accounting practices and into various of its officers, including petitioner. Petitioner thereafter retained counsel to represent him in connection with such investigations and so notified the government. App. A4.

As part of the investigation, Kim Douglas Daniel, the Assistant U.S. Attorney ("AUSA") for the Middle District of Pennsylvania leading the criminal investigation, contacted petitioner's attorney to schedule an interview with petitioner. After reviewing the proposed agenda for the meeting, counsel advised petitioner against the interview and cancelled the meeting with AUSA Daniel.

Notwithstanding Pennsylvania Rules of Professional Conduct 4.2 and 8.4, which forbid attorney contact, either directly or through a surrogate, with a represented party without the consent of that party's lawyer, AUSA Daniel enlisted the help of Rite Aid's former President and Chief Operating Officer, Timothy Noonan, to secretly act as his surrogate, to ques-

tion petitioner under false pretenses outside the presence of petitioner's attorney, and to record the conversations while the FBI videotaped the meetings from a distance. Noonan met with petitioner six times from March through May 2001. App. A5. AUSA Daniel directed Noonan regarding the topics to address in those conversations, and in one instance provided Noonan with a fictitious letter from the government to guide the discussion.

3. On June 21, 2002, petitioner and three other former Rite Aid officers were indicted on various counts charging fraud, false statements, and obstruction of justice in connection with Rite Aid's restatement of income and the subsequent investigations thereof.

4. Prior to the trial, petitioner and a co-defendant filed a motion to suppress the tapes of the Noonan conversations, arguing that the government had obtained them in violation of the 1998 McDade Amendment and Pennsylvania Rules of Professional Conduct 4.2 and 8.4, restricting contact with persons represented by counsel.[2] Rule 4.2 prohibits a lawyer from communicating with a person represented by another lawyer in a matter unless he has the consent of that lawyer or is "authorized by law" to communicate with that person. PENN. R. PROF. CONDUCT 4.2. Rule 8.4(a) prohibits a lawyer from violating the ethics rules "through the acts of another." PENN. R. PROF. CONDUCT 8.4. The McDade Amendment makes

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[2] Petitioner's co-defendants pled guilty and are no longer parties to this case. App. A6 n. 2.

state ethics rules binding on federal attorneys. 28 U.S.C. § 530B(a).

5. On January 13, 2003, the district court denied the motion to suppress, holding that the AUSA's contact with petitioner did not violate Rule 4.2 because it was "authorized by law" and that suppression was not an appropriate remedy in any event. App. B15-B16, B23.

The district court initially recognized that "it is beyond doubt that AUSA Daniel was bound by the Pennsylvania Rules of Professional Conduct at all times relevant to the instant motion." App. B10. The court also recognized that "AUSA Daniel could not avoid the dictates of Rule 4.2 by employing Noonan as his surrogate to accomplish what he himself could not do without violating the Rules of Professional Conduct." *Id.*

Looking to the Third Circuit's pre-McDade Amendment decision in *United States* v. *Balter*, 91 F.3d 427, 435-36 (CA3), *cert. denied*, 519 U.S. 1011 (1996), involving New Jersey's no-contact rule, the court further recognized that *Balter*'s primary ground for finding no violation of the rule – that prior to indictment the defendant there was not a "party" covered by the rule – was "inapplicable to the instant case." App. B11. Unlike New Jersey caselaw, which limited its no-contact rule to the period " 'after formal legal or adversarial proceedings have commenced,' " the court found that "there is no caselaw limiting application of the Pennsylvania no-contact rule to post-indictment contacts." App. B12 (citation omitted). Rather, the court found just the opposite in Pennsylvania, quoting the official comments to Pennsylva-

nia's Rule 4.2, which provided that "[t]his Rule covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question." PENN. R. PROF'L CONDUCT 4.2, official comment. The court thus found that "it is clear that, at the time of the recorded conversations, Defendants Grass and Brown were parties as that term is contemplated in Rule 4.2." App. B12.

Despite such recognitions, however, the district court relied on *Balter*'s alternate ground that " 'pre-indictment investigation by prosecutors is precisely the type of contact exempted from the Rule as "authorized by law." ' " App. B12 (quoting *Balter*, 91 F.3d at 436). Neither the district court nor *Balter*, however, identified any particular "law" actually authorizing contacts otherwise within the scope of the no-contact rule. Rather, both *Balter* and the district court relied on cases from other circuits holding that earlier no-contact rules in other States did not apply to pre-indictment communications, despite the broader scope of Rule 4.2. App. B13.

In the alternative, the court held that even assuming a violation of Rule 4.2, suppression was not the proper remedy. Incorrectly narrowing the interests protected by the no-contacts rule, the court erroneously held that "the primary purpose of the no-contact rule is to prevent an attorney from intentionally tricking an opposing party into waiving the protections of the attorney-client relationship; presumably the confidentiality of attorney-client communications and trial strategies." App. B26. Finding no injury to such confidentiality where defendant spoke to a non-lawyer, the court held that "the purpose behind

the no-contact rule – *i.e.* the protection of the confidential nature of the attorney-client relationship – would not be vindicated by suppression of the Noonan tapes." App. B28. The court also deemed the government's surreptitious contacts to have been in the good-faith belief that it did not violate Rule 4.2, and hence insufficiently egregious to trigger exclusion of the conversations. *Id.*

6. On September 25, 2003, the District Court empanelled petitioner's jury and the presentation of evidence began the next day. During the government's case-in-chief, it displayed to the jury a presentation consisting of a video display of portions of the recorded conversations, purportedly synchronized with the matching audio recordings and a rolling transcript of the conversation projected across the screen. The government also elicited testimony from its confidential informant, Noonan, regarding the content of his conversations with petitioner. App. A11, A27.[3]

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[3] Before, during, and after the trial, there was a substantial dispute regarding the authenticity of the recordings used by the government at trial and regarding whether the government had produced accurate and complete transcripts of those conversations. App. A9-A22. There were substantial indications of evidence tampering and withholding of exculpatory and impeaching information, but those issues are highly fact-bound and thus unfortunately not suitable for this Court's review. Cf. App. A26 ("While a different fact-finder might have reached a conclusion contrary to the one the Court reached, the record by no means compels a conclusion that the tapes were inauthentic."). The dispute, however, demonstrates that there was at least substantial evidence of government misconduct beyond the ethics of the AUSA's *ex parte* contacts with petitioner.

7. On October 17, 2003, petitioner was convicted on various counts of fraud, false statements, obstruction, and witness tampering. App. A6, A13.

8. On October 14, 2004, the district court sentenced then-76-year-old petitioner to ten years in prison followed by two years of supervised release. App. A2, A6. Judgment of conviction and sentence was entered the following day. Petitioner surrendered himself on March 3, 2005 and has spent over five years in prison.[4]

9. On February 22, 2008, the district court denied petitioner's Rule 33 motion for a new trial, which presented new evidence that the government tampered with the audio and video tapes of the Noonan conversations and withheld an audible copy of one of the tapes containing exculpatory material. App. A17-A22.

10. Petitioner appealed to the Third Circuit arguing, *inter alia*, that the district court erroneously denied his motion to suppress the audio and video recordings obtained in violation of the no-contact rule and the McDade Amendment.[5]

11. The Third Circuit affirmed petitioner's conviction, though it remanded for resentencing in light of

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[4] On August 16, 2010, due to health considerations, petitioner was temporarily released from prison and placed on home confinement pending resentencing. Resentencing is currently scheduled for September 29, 2010.

[5] Petitioner also appealed the denial of his motion for a new trial based on tampering with the tapes and withholding evidence, an issue concerning the court's treatment of an attempted plea agreement, and a sentencing issue. Those issues are not presented in this Petition.

United States v. *Booker*, 543 U.S. 220 (2005). App. A2-A3.

Regarding the motion to suppress for violation of the no-contact rule and the McDade Amendment, there was no dispute that AUSA Daniel was bound by Pennsylvania's no-contact rule as embodied in Rules 4.2 and 8.4 and that he used Noonan as a proxy to contact and question petitioner without defense counsel's consent. App. A30. The only issue, therefore, was whether such pre-indictment contact fell within the exception for contacts "authorized by law," a legal question that the court reviewed *de novo*. App. A29-30.

Relying on its pre-McDade Amendment decision in *Balter*, the court held that such pre-indictment contact was " 'exempted by the Rule as "authorized by law," ' " based on its own *policy* views regarding the advantages of allowing prosecutors to engage in such surreptitious contact with a represented party:

> "Prohibiting prosecutors from investigating an unindicted suspect who has retained counsel would serve only to insulate certain classes of suspects from ordinary pre-indictment investigation. Furthermore, such a rule would significantly hamper legitimate law enforcement operations by making it very difficult to investigate certain individuals."

App. A31-32 (quoting *Balter*, 91 F.3d at 435-36).

The court reached that conclusion despite acknowledging that there were no Pennsylvania cases exempting pre-indictment investigations from the no-contact rule and that the McDade Amendment was enacted, in part, for the very purpose of combating

abuse of the no-contact rule by federal prosecutors. App. A33-A34.

The court recognized the Second Circuit's contrary conclusion in *United States v. Hammad,* 858 F.2d 834, 839-40 (CA2 1988), *cert. denied,* 498 U.S. 871 (1990), "that a federal prosecutor overstepped the boundaries of legitimate pre-indictment investigation by preparing a false grand jury subpoena to aid a confidential informant elicit admissions from a represented suspect." App. A32. It declined to follow that precedent and instead stuck with its own precedent in *Balter.*

In a footnote the court also agreed with the district court that even if there was a violation of the no-contact rule, suppression of the unethically-obtained material would not be the proper remedy. App. A35 n. 23 (citing *Hammad,* 858 F.2d at 841-42).

After rejecting other challenges not at issue in this petition, and vacating petitioner's sentence in light of *Booker,* App. A7-A29, A35-A57, the court affirmed petitioner's conviction and remanded for resentencing.

12. On May 6, 2010, the Third Circuit denied Brown's petition for rehearing *en banc.* App. C1-C2.

REASONS FOR GRANTING THE WRIT

This Court should grant the petition for a writ of certiorari because the decision below erroneously resolves an important national issue that should be addressed by this Court and conflicts with decisions of the Second and Ninth Circuits.

I. The Third Circuit Erroneously Exempted Federal Prosecutors from Binding Ethics Rules Based on its Own Policy Views, in Conflict with the Second and Ninth Circuits.

Most States have long had ethics rules restricting attorneys from having direct or indirect contacts regarding a legal matter with a person represented by another lawyer in connection with such matter, without such other lawyer's consent. See Paula J. Casey, *Regulating Federal Prosecutors: Why McDade Should Be Repealed*, 19 GEORGIA ST. UNIV. L. REV. 395, 398-99 (2002) (hereinafter "*Regulating Federal Prosecutors*") (describing state adoption of the ABA Canons of Professional Ethics, Model Code of Professional Responsibility, and Model Rules of Professional Conduct); ABA, *Model Rules of Professional Conduct: Dates of Adoption*, available at www.abanet.org/cpr/mrpc/chron_states.html (viewed on Sept. 2, 2010) (listing dates of adoption of rules from 1988 through 2009 for 50 states and the District of Columbia). Such rules generally contain an exception for attorney contacts that are authorized by law. See, e.g., ALAB. R. PROF'L CONDUCT 4.2 ("unless the lawyer * * * is authorized by law to do so"); CALIF. R. PROF'L CONDUCT 2-100 (excluding "Communications otherwise authorized by law"); COLO. R. PROF'L CONDUCT 4.2 ("unless the lawyer * * * is authorized to do so by law or a court order."); ILL. R. PROF'L CONDUCT 4.2 (same).

The application of the no-contact rule to federal prosecutors has been the source of much controversy. Note, *Federal Prosecutors, State Ethics Regulations, and the McDade Amendment*, 113 HARV. L. REV.

2080, 2084 (2000) (hereinafter "*Federal Prosecutors*") ("The sharpest controversy concerning ethics rules and federal prosecutors has surrounded the application of Model Rule 4.2 and its predecessor, Model Code Disciplinary Rule 7-104 ('DR 7-104'), to preindictment contacts."). Federal prosecutors have routinely sought to evade such no-contact rules, typically in the context of pre-indictment investigations using confidential informants to obtain and record statements by represented targets of those investigations. The Department of Justice has variously claimed that state no-contact rules were not binding on federal attorneys, did not apply to pre-indictment investigations, and that DOJ practice and policy regarding the use of such informants satisfied the exception for contacts "authorized by law."[6] Such efforts were often, though not always, successful in the courts, but caused considerable controversy regarding the perceived ethical double standard applied to federal prosecutors.[7]

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[6] See *Federal Prosecutors*, 113 HARV. L. REV. at 2084-86 (discussing various DOJ opinions, memoranda, and regulations claiming exemption from no-contact rule); see also *United States* ex rel. *O'Keefe* v. *McDonnell Douglas Corp.*, 132 F.3d 1252, 1257 (CA8 1998) (rejecting DOJ regulations attempting to codify exemption from state ethics rules).

[7] Jerry Norton, *Ethics and the Attorney General*, 74 JUDICATURE 203, 207 (1991) (questioning whether government attorneys were being judged by lower ethical standards than other bar members); Rep. Joseph M. McDade, Statement before the Subcomm. on Courts and Intellectual Property, Sept. 12, 1996, 1996 WL 520240 (Fed. Doc. Clearing House) ("We have to ask ourselves whether we want to permit the Attorney General to create ethics rules for prosecutors which demand less of prosecutors than of all other lawyers? The answer, of course, is no.

The controversy and dissatisfaction were so great that in 1998 Congress intervened and passed the McDade Amendment, 28 U.S.C. § 530B, effective April 19, 1999. While the McDade Amendment generally makes all state ethics rules binding on federal attorneys, it is widely recognized as a particular response to federal prosecutorial abuse of the no-contact rule in the course of criminal investigations. See Rep. Joseph M. McDade, Statement before the Subcomm. on Courts and Intellectual Property, Sept. 12, 1996, 1996 WL 520240 (Fed. Doc. Clearing House) (criticizing DOJ regulation "permitting its prosecutors to communicate directly with defendants who have lawyers" and noting that a "requirement in all 50 states and one of the American Bar Association's Model Rules of Professional Conduct (Rule 4.2) states that it is unethical to communicate directly with suspects in the absence of their lawyer."); *Federal Prosecutors,* 113 HARV. L. REV. at 2088 (McDade Amendment introduced to "restrain the perceived overzealousness of federal prosecutors and to prevent the DOJ from exempting its prosecutors from ethics rules"); Casey, *Regulating Federal Prosecutors*, 19 GEORGIA ST. UNIV. L. REV. at 402 (McDade Amendment "was widely believed" to be, *inter alia*, "a response to the contact rule"). Even the Third Circuit below recognized as much. App. A33 ("We recognize that Congress passed the McDade Amendment in part to combat perceived abuses by federal prosecu-

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If we tolerate unethical government conduct, then we undermine citizen confidence in our government. Congress must not permit that to happen.").

tors and require them to comply with state no-contact rules.").

In considering the McDade Amendment, Congress was well aware of the policy concerns voiced by the DOJ and others – and endorsed by the Third Circuit below – regarding the effect the Amendment would have on the federal practice of using confidential informants to elicit statements from represented parties outside the presence and without the consent of their lawyers.[8] Such arguments were ultimately unpersuasive to Congress, which proceeded to enact the McDade Amendment. In the years since the McDade Amendment, various attempts to exempt federal investigatory activities from state ethics rules have failed. *Federal Prosecutors,* 113 HARV. L. REV. at 2093-94; Casey, *Regulating Federal Prosecutors*, 19 GEORGIA ST. UNIV. L. REV. at 410 n. 95.

The McDade Amendment stands as ample rejection of the DOJ's efforts to insulate federal prosecutors from the requirements of state ethics rules. There is no longer any plausible dispute that state ethics rules, including the no-contact rule at issue in this case, apply to federal prosecutors. There is likewise little dispute that the rule applies even pre-indictment absent a state ethics rule or opinion limit-

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[8] Ethical Standards for Federal Prosecutors Act of 1996: Hearing on H.R. 3386 before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 104th Cong. at 12 (1996) (statement of Assoc. Deputy Att'y Gen. Seth P. Waxman) ; Statement of Rep. McDade, 1996 WL 520240 (referring to and submitting for the record DOJ regulations attempting to authorize prosecutorial exemption from no-contact rule).

ing the scope of the rule. Indeed, both courts below admitted that Pennsylvania Rule 4.2 applies even where a represented person is not yet a party to a formal proceeding. See *supra* at 5-6, 9; see also Casey, *Regulating Federal Prosecutors*, 19 GEORGIA ST. UNIV. L. REV. at 400 n. 39 ("Model Rule 4.2 was amended in 1995 to clarify that it was intended to apply to every represented person, not just those who are parties to formal litigation").

Unfortunately, federal prosecutors continue to argue, and the Third Circuit has now accepted, that established practice and mere policy concerns are sufficient to render otherwise forbidden contacts "authorized by law" within the terms of the no-contact rule. That decision is contrary to the terms of Rule 4.2, the McDade Amendment, and decisions of the Second and Ninth Circuits.

The decision below recognized that there were no Pennsylvania cases or ethics opinions authorizing the type of contacts at issue in this case, and hence the court was unable to point to any "law" that authorized the otherwise plainly forbidden contact. App. A33-34 ("Pennsylvania courts have not considered whether such conduct is permissible"; while *Balter* relied in part on New Jersey case law holding that pre-indictment investigatory contacts were "authorized by law" under that State's rule, "there is no analogous Pennsylvania decision"). But in a severe distortion of the phrase "authorized by law," the court held that there was likewise no state decision expressly *forbidding* the particular contacts in this case and relied upon its own policy views to declare that the contacts were authorized by law. App. A33-34

("After all, the Pennsylvania courts have *not* held that such conduct is impermissible"; "we do not believe the absence of an analogous Pennsylvania decision renders any less compelling our observations regarding the negative consequences that would follow from an outcome contrary to that we reach here") (emphasis in original).

The plain terms of the operative portion of Rule 4.2 apply to and forbid the contact in this case. The exception for contacts "authorized by law" places the affirmative burden on attorneys who would violate the rule to support their conduct with explicit authorization. The mere absence of a further express disapproval by the Pennsylvania courts of such contacts does not render that conduct "authorized by law." See *County of Washington* v. *Gunther*, 452 U.S. 161, 169 (1981) (construing an exception to Title VII for behavior "authorized" by the Equal Pay Act and holding that "[a]lthough the word "authorize" sometimes means simply 'to permit,' it ordinarily denotes affirmative enabling action. BLACK'S LAW DICTIONARY 122 (5th ed. 1979) defines 'authorize' as '[t]o empower; to give a right or authority to act.'[] * * * The question, then, is what wage practices have been affirmatively authorized by the Equal Pay Act.") (footnote omitted); *id.* at 169 n. 9 ("Similarly, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 147 (1976) states that the word 'authorize' 'indicates endowing formally with a power or right to act, usu. with discretionary privileges.' (Examples deleted.)").

The Court's reliance on its own policy judgments regarding the utility of surreptitious contacts with represented targets of a federal investigation also

does severe violence to the McDade Amendment. Congress considered the identical policy arguments from opponents of the McDade Amendment and rejected them by adopting the law in any event. See *supra* at 12-14. It is for Congress and the States, not the federal courts, to make the policy judgment whether the benefits of restricting prosecutorial contacts outweigh the costs from limiting certain investigatory techniques deemed to be unethical.[9]

For the Third Circuit to substitute its own policy judgments for that of Congress and the States, and to claim that such judgments constitute authorization by law, flies in the face of both the language of Rule 4.2 and Congress's authority and judgment regarding the desirability of ethical constraints on the behavior of federal prosecutors.

In addition to being contrary to the McDade Amendment and the language of Rule 4.2, the decision below conflicts with the decisions of the Second and Ninth Circuits.

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[9] The same policy concerns cited by the Third Circuit likewise apply to investigatory efforts at the state level yet the Pennsylvania courts have not excluded pre-indictment contacts from the scope of the Rule or held that they are "authorized by law." Indeed, unlike New Jersey, Pennsylvania law does not require the initiation of formal proceedings before the no-contact rule applies. See *supra* at 5-6. The Third Circuit's attempt to distinguish pre- and post-indictment contacts by calling the former an established investigatory technique, thus flouts the official construction of the Rule rejecting such a distinction. And it violates the McDade Amendment's mandate that federal attorneys are bound by state ethics rules "to the same extent and in the same manner as other attorneys in that State." 28 U.S.C. § 530B(a).

As the court below noted, App. A32, the Second Circuit in *Hammad* held that a federal prosecutor violated New York's no-contact rule (DR 7-104(A)(1)) by using a confidential informant to elicit incriminating statements from the represented target of a criminal investigation. 858 F.2d at 839-40. The government attorney in *Hammad* directed the confidential informant regarding what questions to ask, and provided a fictitious grand jury subpoena addressed to the informant to serve as a prop to direct the conversation in the desired direction.

The Second Circuit held that the no-contact rule applied prior to indictment and that the contact was not authorized by law where the informant acted as the alter ego of the AUSA.

Although recognizing that the application of DR 7-104(A)(1) at the pre-indictment stage was a "closer question" (unlike the broader reach of Rule 4.2 here, which is not in dispute), the court found "no principled basis in the rule to constrain its reach" to post-indictment contacts and noted that courts holding otherwise "'have not clearly stated the bases for those decisions.'" 858 F.2d at 838 (citation omitted). The Second Circuit cited favorably to district court decisions applying the rule to pre-indictment contacts and held that to limit the rule to post-indictment communications – to which the Sixth Amendment separately applies – would "make[] the rule superfluous," "'is neither apparent nor compelling,'" and that the "sixth amendment and the disciplinary rule serve separate, albeit congruent purposes." *Id.* at 838-39 (citation omitted).

While the court expressed sympathy with the government's contention that applying the no-contact rule "would impede legitimate investigatory practices," it nonetheless went on to hold that though the "use of informants to gather evidence against a suspect will frequently fall within" the exception to the rule for contacts "authorized by law," the contacts in this case were not so authorized. *Id.* at 839-40. The court declined to "list all possible situations that may violate DR 7-104(A)(1), but held that where the prosecution provided false documents to the informant "to create a pretense that might help the informant elicit admissions from a represented suspect," the informant became the "alter ego of the prosecutor" and "the informant was engaging in communications proscribed by" the no-contact rule. *Id.* at 840.[10]

In the present case, the AUSA similarly orchestrated Noonan's conversations with petitioner and provided a false document to Noonan "to create a pretense that might help [him] elicit admissions from"

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[10] Although not an exhaustive distinction between authorized and unauthorized contacts, the crux of the Second Circuit's holding turns on the degree of control the AUSA exercises over its confidential informant. Where an AUSA actively directs the informant's questioning and provides pretextual props to guide the conversation and elicit admissions, the informant becomes the AUSA's "alter ego" and the contact is not "authorized by law." In contrasts, where an AUSA merely passively wires an informant to record conversations not being manipulated and shaped by the informant and the AUSA, the contact may be "authorized." The continued availability of such passive undercover activities under the Second Circuit's approach strikes a logical balance between legitimate investigation and unauthorized attorney contacts and mitigates the concern over interfering with law enforcement.

petitioner. Noonan was thus indisputably the "alter ego" of the AUSA, and the decision below conflicts with *Hammad*.

The Ninth Circuit likewise has held that "general enabling statutes" were insufficient to render contacts with represented parties "authorized by law" under the California version of the no-contacts rule, holding that more concrete statutory authority was required to authorize contacts beyond that permitted by case law." *United States* v. *Lopez*, 4 F.3d 1455, 1461 (CA9 1993). Although the court was addressing a post-indictment contact, its views on what *type* of authority is required to "authorize" an otherwise prohibited contact is not dependent on that contextual difference. Rather, the court held that absent specific statutory or judicial authority for prohibited contacts, such contacts were not "authorized by law."[11]

The cases relied upon by the Third Circuit in support of its conclusion, App. A31-A32, all were decided before the McDade Amendment, and either limited the rule to post-indictment or custodial contacts, or held that the informant was not the alter ego of the

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[11] The Ninth Circuit did note that cases in some circuits had held pre-indictment non-custodial contacts to be beyond the scope of the then-extant no-contact rules. 4 F.3d at 1460-61 & n. 2. Such cases often turned on the rules' application to a "party" being construed as requiring the initiation of formal legal proceedings to trigger the rule's constraints. See *infra*, at 21 n. 12. Those cases provide no authority limiting the scope of the later-adopted Rule 4.2, which is not so limited and applies even in the absence of formal legal proceedings. See *supra* at 5-6. Of course, if there were Pennsylvania cases construing its Rule 4.2 to allow the contacts in this case, that would indeed constitute "authorization by law." There are no such cases, however.

prosecutor.[12] None of those cases addressed the authorized by law exception, and the reasoning they used – that the rule does not apply prior to initiation of formal proceedings – does not apply to Rule of Professional Conduct 4.2.

The ethics of pre-indictment prosecutorial contact with represented targets is an important issue that arises in many criminal investigations and prosecutions, as the DOJ's own policy arguments recognize. Whatever the putative benefits of such contacts, their ethical consequences arise with precisely the same frequency as those benefits. The no-contact rule exists in large part to protect represented individuals from being taken advantage of by adverse attorneys and to allow them to guard against making uncounseled admissions that subsequently can be used against them in litigation. Where the adverse attor-

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[12] *United States* v. *Powe*, 9 F.3d 68 (CA9 1993) (holding, without explanation, that California no-contact rule does not apply to pre-indictment non custodial contacts with a suspect); *United States* v. *Ryans*, 903 F.2d 731 (CA10) (holding that no-contact rule in DR 7-104(A)(1) does not apply "before the initiation of criminal proceedings"), *cert. denied*, 498 U.S. 855 (1990); *United States* v. *Sutton*, 801 F.2d 1346, 1366 (CADC 1986) (relying on *United States* v. *Lemonakis*, 485 F.2d 941, 956 (CADC 1973), *cert. denied*, 415 U.S. 989 (1974), which held that the no-contact rule did not apply during the investigatory stage where the informant was not the "alter ego" of the prosecutor); *United States* v. *Dobbs*, 711 F.2d 84, 86 (CA8 1983) (citing *Lemonakis* and pre-indictment non-custodial nature of interview to conclude that DR 7-104(A)(1) did not apply); *United States* v. *Weiss*, 599 F.2d 730, 740 (CA5 1979) (finding no violation of no-contact rule because defendant's attorney was also under criminal investigation, which the court thought was a sufficient reason to ignore an even earlier Canon of Ethics embodying the no-contact rule).

ney is employed by the government, the rule serves many of the same functions as the Fourth, Fifth, and Sixth Amendments. Congress's determination that application of state ethics rules was necessary to constrain prosecutorial abuse of, *inter alia*, the no-contact rule, and that the benefits of applying such rules outweighed their claimed burdens on law enforcement, likewise reflects on the importance of the issue. This Court therefore should grant certiorari to resolve the split in the circuits regarding application of the no-contact rule and to confirm that federal courts may not manufacture their own policy-based "authorization" for federal prosecutors to violate that rule.

II. The Third Circuit Erroneously Held that Suppression Is Not an Appropriate Remedy for Statements Obtained through Unethical Prosecutorial Conduct, in Conflict with the Second and Tenth Circuits.

The Third Circuit's further holding that, even assuming a violation of Rule 4.2, "suppression would not have been the appropriate remedy," App. A35 n. 23, also presents an important issue and is in conflict with decisions of this and other courts. The court's sole support for that proposition was its citation to the Second Circuit's decision in *Hammad*, which, although finding a violation of the no-contact rule, held that exclusion of the resulting statements was not appropriate because "the law was previously unsettled in this area" and "in light of the prior uncertainty regarding the reach of DR 7-104(A)(1)." 858 F.2d at 842.

The Third Circuit in this case, however, offered no comparable justification, but simply rejected exclusion out of hand. Unlike in *Hammad*, there is no uncertainty regarding the scope of Rule 4.2. Under Pennsylvania law Rule 4.2 plainly applies prior to the initiation of formal proceedings – *i.e.*, at the pre-indictment stage. It is precisely that issue that was "uncertain" under DR-104(A)(1), the prior version of the no-contact rule considered in *Hammad* and other cases cited by the Third Circuit. See *supra* at 21 n. 12. But cases reading the scope of the earlier no-contact rule narrowly cannot be read as creating "uncertainty" regarding the reach of Pennsylvania's Rule 4.2, which specifically resolves that uncertainty in the official comments. Indeed, the district court opinion recognized that substantive application of Rule 4.2 to this case – apart from the "authorized by law" exception – was "beyond doubt" and "clear." App. B10, B12.

The lack of statutory authority or Pennsylvania law authorizing the conduct here also was not in question. That the Third Circuit manufactured "authorization" for the pre-indictment contacts based on its own policy views hardly makes the law uncertain, particularly insofar as identical policy arguments for limiting the application of state ethics rules were rejected by Congress when it passed the McDade Amendment. This is not a situation of good-faith efforts to comply with Rule 4.2, or uncertainty regarding its scope, but rather a continuation of the DOJ's long-running efforts to circumvent state ethics rules generally and the no-contact rule specifically. That such efforts continue unabated even after the

McDade Amendment amply demonstrates a need for the deterrence that exclusion would supply.

The Third Circuit's rejection of suppression as an appropriate remedy for violation of the no-contact rule also conflicts with the decisions of other circuits addressing such violations. Other courts considering evidence obtained in violation of the no-contact rule have held, contrary to the Third Circuit, that exclusion is indeed an appropriate remedy for such violations.

The Tenth Circuit in *United States* v. *Thomas*, for example, required the exclusion of statements taken in violation of the no-contact rule contained in the earlier Canons of Ethics. 474 F.2d 110, 112 (CA10) ("any statement obtained by interview from [a defendant represented by counsel] may not be offered in evidence for any purpose unless the accused's attorney was notified of the interview"), *cert. denied,* 412 U.S. 932 (1973). And the Second Circuit in *Hammad*, although declining to suppress the statements therein because of previous uncertainty in the law, nonetheless expressly "reject[ed] the government's effort to remove suppression from the arsenal of remedies available to district judges confronted with ethical violations." 858 F.2d at 842; see also *United States* v. *Killian,* 639 F.2d 206, 210 (CA5) (where the government obtained statements from defendant in violation of DR 7-104(A)(1), "[s]uppression of the statements would probably have been the appropriate sanction in this case, were it not for the refusal of the government to use those statements."), *cert. denied,* 451 U.S. 1021 (1981); *United States* v. *Durham,* 475 F.2d 208, 211 (CA7 1973) (statements could not be

admitted into evidence where they were obtained in the absence of retained counsel in violation of the Sixth Amendment and in circumstances "appear[ing] to raise ethical questions" under DR 7-104(A)(1)); but see *United States* v. *Lowery*, 166 F.3d 1119, 1124 (CA11) ("a state rule of professional conduct cannot provide an adequate basis for a federal court to suppress evidence that is otherwise admissible"), *cert. denied*, 528 U.S. 889 (1999).

The Third Circuit's decision in this case thus contributes to a division among the circuits regarding whether suppression is an appropriate remedy for violations of the no-contact rule.

The Third Circuit's rejection of suppression as an appropriate remedy also is in conflict with decisions of this Court holding that suppression or exclusion is a proper remedy for statutory, as well as constitutional, violations.[13] *McNabb v. United States,* 318 U.S. 332, 341, 345 (1943) ("The principles governing the admissibility of evidence in federal criminal trials have not been restricted * * * to those derived solely from the Constitution."; allowing the use of statements obtained in "flagrant disregard of the procedure which Congress has commanded," even where "Congress has not explicitly forbidden the use of evidence so procured," would "stultify the policy which Congress has enacted into law"); *United States* v. *Payner,* 447 U.S. 727, 734-35 & n. 7 (1980) ("Federal courts may use their supervisory power in some cir-

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[13] While ethics rules are typically adopted by state bars and state courts, they are binding on federal prosecutors pursuant to statute – the McDade Amendment.

cumstances to exclude evidence taken from the *defendant* by 'willful disobedience of law.' ") (emphasis in original; quoting *McNabb*, 318 U.S. at 345).

Congress went to great lengths to address what it viewed as the abusive practices of federal prosecutors and to require them to abide by state ethical standards. To allow prosecutors to use evidence obtained from a defendant in violation of those standards would indeed "stultify" Congress's policy in the McDade Amendment of requiring compliance with state ethics rules.

The propriety of exclusion is confirmed by one of the central purposes of the no-contact rule – "to 'prevent situations in which a represented party may be taken advantage of by adverse counsel.' " *Frey v. Department of Health and Human Servs.*, 106 F.R.D. 32, 34 (E.D.N.Y. 1985) (quoting *Wright By Wright v. Group Health Hosp.*, 691 P.2d 564, 567 (Wash. 1984)). The rule's historical purpose of " 'shielding the adverse party from improper approaches,' " *id.*, reflects the concern that "an adversary's attorney may take advantage of an individual party * * * by extracting damaging statements from him," *University Patents, Inc. v. Kligman*, 737 F. Supp. 325, 327 (E.D. Pa. 1990). Such improper conduct is precisely what occurred in the present case and is precisely what the no-contact rule seeks to prevent.[14]

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[14] The district court's suggestion that the purpose of the no-contact rule is merely to protect attorney-client confidentiality and has no application where petitioner spoke to a third-party (Noonan), App. B26-28, ignores the more fundamental purpose of the rule to prevent an adverse attorney from taking advantage of a party outside the presence of that party's counsel. By

Indeed, if anything, the AUSA's surreptitious use of a *proxy* to interview petitioner was even more disturbing given that Noonan's questioning of petitioner was being guided by the prosecutor with an eye toward obtaining admissions, but petitioner was unaware of the prosecutor's involvement and hence could not even protect himself from being taken advantage of. Rather, he spoke casually without an eye to precision that could have avoided the subsequent disputes over what he said and meant and over whether it was petitioner or Noonan that actually made various supposedly incriminating statements. See, e.g., App. A19-20 (discussing dispute over whether petitioner or Noonan mentioned supposed destruction of evidence).

The central dangers the no-contact rule was designed to mitigate were amply present in this case and arose from the fully intentional efforts of the AUSA to manipulate and shape the conversations between Noonan and petitioner in order to obtain adverse and uncounseled admissions. In light of the DOJ's long-running efforts to free itself from state ethical constraints on such practices, even after the adoption of the McDade Amendment, the need for meaningful deterrence of that conduct is manifest.[15]

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misidentifying the relevant purpose of the no-contact rule, the district court undervalued the need for exclusion as a proper remedy for its violation.

[15] The district court's suggestion, App. B30-B31, that "the Government relied in good faith on the long line of cases holding that pre-indictment non-custodial interrogation with a party represented by counsel is 'authorized by law,'" is not even remotely persuasive given that none of those cases so hold. Rather, they rely on grounds of substantive inapplicability pre-

As this Court observed in *Mapp v. Ohio* in the analogous Fourth Amendment context, anything short of exclusion would be "worthless and futile" for securing the no-contact rule's goals. 367 U.S. 643, 652 (1961).

This Court should grant certiorari to resolve the split in the circuits regarding the propriety of exclusion as a remedy for violations of the no-contact rule and to vindicate the Congressional policy judgments embodied in the McDade Amendment, making state ethics rules binding on federal prosecutors.

CONCLUSION

For the reasons above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Dated: September 3, 2010

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indictment that the district court admits elsewhere do not apply to Rule 4.2. See *supra* at 21 n. 12.

APPENDICES

A. Third Circuit Opinion, Feb. 23, 2010 ..... A1-A58

B. Middle District of Pennsylvania Opinion denying suppression motion, Jan. 13, 2003 ..... B1-B31

C. Third Circuit denial of rehearing *en banc*, May 6, 2010 ..... C1-C2

APPENDIX A

595 F.3d 498

United States Court of Appeals,
Third Circuit.
UNITED STATES of America
v.
Franklin C. BROWN, Appellant.
Nos. 04-4164, 05-3879, 08-1569.

Argued Dec. 16, 2009.
Filed: Feb. 23, 2010.

Before: SLOVITER, JORDAN, and GREENBERG, Circuit Judges.

OPINION OF THE COURT

GREENBERG, Circuit Judge.

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*502 I. INTRODUCTION

This matter comes on before this Court on Franklin Brown's consolidated appeals from: (1) a judgment of conviction and sentence entered by the District Court on October 15, 2004, reflecting the sentence the Court imposed on October 14, 2004; (2) an order denying Brown's motion for a new trial entered by the District Court on August 10, 2005; and (3) an order denying Brown's renewed motion for a new trial or for dismissal of the indictment entered by the District Court on February 22, 2008. For the reasons that follow, we will affirm the judgment of conviction

and the orders denying Brown's motion for a new trial or dismissal of the indictment, but will remand the case for Brown's resentencing in light of *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).

II. BACKGROUND

Brown worked for the Rite Aid Corporation, the operator of a chain of retail drug stores, for more than 30 years, eventually rising to become one of its top executive officers, before resigning in 2000. From 1995 until 1999, while Brown was serving as Rite Aid's Chief Legal Counsel and then as a Vice Chairman of its Board of Directors, Martin Grass was Rite Aid's Chief Executive Officer. Under Grass's leadership, Rite Aid aggressively expanded its operations by acquiring and building hundreds of drugstores throughout the United States. This expansion seemingly was rewarded with soaring profits, and Rite Aid's stock price rose by more than 300% between the date that Grass assumed control of the company and the beginning of 1999.

Troubles within Rite Aid surfaced, however, when it released a statement in March 1999 revealing significantly lower than expected earnings and higher than expected expenses, resulting in its stock losing more than half of its value in a single day. After the value of Rite Aid stock continued to slide over the next several months, the Rite Aid Board of Directors on October 18, 1999, issued a press release announcing that Grass was resigning as CEO and that Rite Aid intended to restate its income negatively for fiscal years 1997-1999. Rite Aid's new leadership then launched an internal investigation that culminated

on July 11, 2000, in a restatement of income of more than one billion dollars for fiscal years 1998, 1999, and the first quarter of fiscal year 2000.[1] When Rite Aid made the July 11, 2000 restatement it was the largest restatement of corporate income in United States history.

The Rite Aid problems naturally triggered public investigations. Thus, the Securities & Exchange Commission commenced a civil probe into Rite Aid's accounting practices and the Federal Bureau of Investigation, in conjunction with the United States Attorney's Office for the Middle District of Pennsylvania, ***503** launched a criminal investigation. FBI agent George Delaney and Assistant United States Attorney ("AUSA") Kim Douglas Daniel led the criminal investigation.

As the criminal investigation progressed, Brown retained counsel and notified the government of this representation. On February 12, 2001, AUSA Daniel contacted Brown's counsel and arranged a meeting between government representatives and Brown for April 4, 2001. On March 28, 2001, AUSA Daniel faxed Brown's counsel an agenda letter setting forth the topics to be discussed at the April 4 meeting. Brown, however, became unwilling to meet with the government, a change in position that led Brown's counsel on or about March 30, 2001, to inform AUSA Daniel that Brown would not consent to participate in the interview.

During the time that the government was communicating with Brown, it also was in contact with Ti-

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[1] Rite Aid did not restate its earnings for fiscal year 1997.

mothy Noonan, Rite Aid's President and Chief Operating Officer during Grass's tenure as CEO. Noonan informed the government that, in response to Brown's request, he had agreed to meet Brown on March 13, 2001. Noonan agreed to act as a confidential informant for the government and surreptitiously record his conversation with Brown. Agent Delaney instructed Noonan to steer the conversation towards the topics listed in the agenda letter that AUSA Daniel had sent to Brown's counsel. Noonan attached a hidden microphone to his body, met with Brown as planned, and recorded their conversation. Pursuant to Noonan's request, Brown and Noonan met again on March 30, 2001, and Noonan again recorded their conversation. In order to focus the conversation on topics related to the government's investigation, Noonan brought a letter addressed to Noonan's counsel signed by AUSA Daniel to the March 30 meeting. The government created the letter solely for use at that meeting and it purported to set forth a discussion agenda for an upcoming meeting between Noonan and the government. This fictitious letter listed topics of discussion similar to those in the letter that AUSA Daniel had sent to Brown on March 28, 2001.

Noonan also recorded conversations with Brown on April 1, 2001, April 27, 2001, and May 21, 2001, as well as his conversation with Grass and Brown on May 2, 2001. Furthermore, an FBI surveillance team made video tape recordings of each of Noonan's conversations with Brown during this period except for that on April 27.

On June 21, 2002, a grand jury in the Middle District of Pennsylvania returned a multi-count indict-

ment against Grass, Brown, Franklyn Bergonzi, and Eric Sorkin arising from the Rite Aid investigation. Bergonzi and Sorkin, respectively, had served as Rite Aid's Chief Financial Officer and Vice President in Charge of Pharma Purchasing. The indictment charged Brown with numerous counts of conspiracy, fraud, making false statements to the SEC, obstruction of justice, and witness tampering.

Brown was convicted at an ensuing jury trial of conspiracy to commit accounting fraud, filing false statements with the SEC, conspiracy to obstruct justice, obstruction of grand jury proceedings, obstruction of government agency proceedings, and witness tampering. In particular, the jury found that Brown had conspired to inflate Rite Aid's reported earnings for fiscal year 1999, had conspired to create backdated severance letters awarding Brown and other executives millions of dollars in compensation, and had interfered with the government's investigation of Rite Aid in a variety of ways. The District Court sentenced *504 Brown to ten years in prison followed by two years of supervised release. Brown has surrendered to the Bureau of Prisons and presently is incarcerated.[2]

III. JURISDICTION

The District Court had jurisdiction over this federal criminal action pursuant to 18 U.S.C. § 3231, and we have jurisdiction to review the judgment of con-

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[2] Grass, Bergonzi, and Sorkin were not tried as they all pleaded guilty to certain charges pursuant to agreements with the government.

viction and sentence pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

IV. DISCUSSION

On this appeal, Brown puts forward a panoply of reasons that he claims require us either to dismiss his indictment, grant him a new trial, or remand his case to the District Court for resentencing though, interestingly, he does not suggest that the evidence at the trial was insufficient to support his convictions. Specifically, Brown maintains that the District Court: (1) abused its discretion when it denied his Rule 33 motion based on newly discovered evidence; (2) improperly denied his pre-trial suppression motion; (3) abused its discretion and committed plain error by interfering in the plea negotiation process; and (4) abused its sentencing discretion in a variety of ways. We address each contention in turn.

A. The Rule 33 Motion

Brown first argues that we should dismiss his indictment or grant him a new trial because forensic evidence suggests that the government tampered with the audio and video tape recordings of Brown's conversations with Noonan prior to disclosing those recordings to Brown and presenting the altered recordings as evidence at his trial.[3]

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[3] The District Court painstakingly set forth the technical details with respect to the recordings' authenticity in its comprehensive opinion denying Brown's renewed motion for a new trial. *See United States v. Brown,* No. 1:02-CR-00146-2, 2008 WL 510126 (M.D.Pa. Feb.22, 2008). We do not restate those details except as necessary for our determination of whether the District Court's denial of Brown's motion challenging the recordings constituted an abuse of discretion.

1. *The Receipt of the Noonan Tapes*

The government on July 24, 2002, shortly after Brown's arraignment, sent the attorneys representing Brown and his co-defendants audio tapes containing copies of the six surreptitiously recorded Noonan conversations (March 13, 2001; March 30, 2001; April 1, 2001; April 27, 2001; May 2, 2001; and May 21, 2001),[4] transcripts of each conversation except that of March 30, and a composite video tape consisting of footage taken by an FBI surveillance team of four of the six Noonan conversations (March 30, 2001; April 1, 2001; May 2, 2001; and May 21, 2001). In the letter enclosing these recordings, the government stated that the poor audio quality of the March 30 tape prevented the production of a complete transcript at that time.[5] Then on July 30, 2002, the government sent the defense lawyers an FBI surveillance videotape of the March 13 conversation,***505** and a 28-page rough transcript of the March 30 conversation.[6]

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[4] We at times will refer to the audio tapes of the Noonan conversations the government sent Brown on July 24, 2002, as the "July 2002 copies."

[5] The letter from the FBI states that the March 13 conversation could not be transcribed, but Brown and the government agree that a transcript of the March 13 conversation was disclosed, and that the missing transcript was that of the March 30 conversation.

[6] In order to produce this rough transcript, the government sent the tape of the March 30 conversation to an FBI laboratory to be enhanced. As we discuss below, the government claims it did not attempt to produce a more thorough transcript of the March 30 conversation because of the extremely poor audio quality of the tape and because the government believed the

According to Brown, after he reviewed these tapes and transcripts, he "immediately recognized that there were radical differences between what [he] observed and heard on the tapes and what [he] recollected of the conversations." App. at 888. Though Brown considered retaining an expert to examine the tapes, his trial counsel initially discouraged him from taking that action, but on or about August 31, 2002, Brown nevertheless brought three of the six tapes to Bruce E. Koenig, an audio-forensic expert the FBI formerly employed, for examination. After Koenig listened to the tapes for several hours, he advised Brown that they were less than ideal samples because they were not originals or first-generation copies, but that Brown should not "waste [his] money" pursuing further examination of the tapes because, according to Koenig, the FBI never tampers with tape-recorded evidence. App. at 889.

2. *Allen's Preliminary Report*

Although Brown claims that he remained convinced that there were substantial irregularities on the tapes, so far as we are aware he did not make any further investigation into the circumstances leading to their preparation to determine whether his belief was correct until approximately one year later when in August 2003 he retained forensic expert Stuart Allen to examine the audio tapes of the March 13 and March 30 conversations. After conducting a digital examination of the tapes, Allen provided Brown with a "Preliminary Forensic Examination Report," dated

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subject matter of the March 30 conversation to be redundant of the other recorded conversations.

September 17, 2003, containing the following preliminary conclusions with respect to the tapes of both conversations:

> *Preliminary digital findings* indicate that the *audiocassettes* examined in our laboratory were copies made from a digital original and contain anomalies of unknown origin....
>
> The preliminary forensic examination of this subject tape identified several anomalies of unknown origin, however the results are inconclusive, since the examination was performed on a copy as previously stated and not the original. The anomalies observed may have been the result of a *faulty duplication process* or some other unknown process yet to be identified.
>
> Therefore it is the professional opinion of this examiner that the *original recording device* and the *original media* associated with the subject recording, be produced and delivered for *non-destructive forensic examination* at this laboratory.

App. at 1165, 1167, 1168 (emphasis in original). Shortly after receiving Allen's report and three days prior to the date that jury selection was set to begin in Brown's trial, one of his lawyers sent an email message to AUSA Daniel inquiring whether it would be possible for Allen to examine the original tapes of the March 13 and March 30 conversations at Allen's

place of business.[7] USA Daniel responded the next *506 business day, September 22, 2003, stating "you gotta be kidding," and asking Brown's attorney to call him to discuss the request. App. at 1169. We are uncertain of AUSA Daniel's reason for taking that approach to Brown's request, though it may have reflected exasperation at the timing of the request.

3. *The Evidence at Trial*

The District Court empaneled Brown's jury on September 25, 2003, and the presentation of evidence began the next day. The trial transcript indicates that early in the proceedings Brown's defense counsel stated to the Court that Brown had "some nagging concerns about the technical aspects of the tapes," but acknowledged that the defense had raised these concerns with the government, and that "[t]he government has been completely cooperative in terms of providing [the defense] with what [it] need[s]." App. at 463. Defense counsel then agreed with the government that the Court should admit the tapes provisionally subject to Brown's right to object to technical aspects of the tapes if an expert examination of them later provided a ground for the objection.

During the government's case-in-chief, it displayed to the jury a presentation consisting of a video display of portions of the recorded Noonan conversations, synchronized with the matching audio recordings and a rolling transcript of the conversation projected across the screen (the "jury presentation"). The

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[7] As we explain below the trial had been scheduled to start in June 2003 but was delayed because of circumstances surrounding an attempt to reach a plea agreement.

government had provided digital copies of the jury presentation to defense counsel several months in advance of trial. At the close of the prosecution's case, the government moved to admit into evidence the audio and video tapes of the Noonan conversations on which the government based its jury presentation. In so doing, the government noted that it had not shown the actual tapes to the jury but, instead, had shown it a computerized presentation generated from the tapes.

According to the government, it did not rely on or move to admit a tape of the March 30 conversation because the recording from that date was largely inaudible, and, in any event, the subject of the March 30 conversation was duplicative of the other recorded Noonan conversations. The defense stated the government had given it an opportunity to review the tapes along with the digital presentation, and the defense agreed that they were accurate representations of the events recorded. The defense did not voice any objection to the tapes being admitted into evidence, but again reserved the right to object later to technical aspects of the tapes. The District Court admitted the tapes into evidence.

4. *Owen's Report*

During the trial, the FBI transported the original reel-to-reel analog tapes of the March 13, March 30, and May 21 conversations to its office in Harrisburg, Pennsylvania, where an FBI agent met with defense expert Tom Owen and allowed Owen to inspect, photograph, and download copies of the tapes onto

Owen's laptop.[8] After conducting a physical and electronic inspection of the downloaded copies that consisted of "[c]ritical listening, tape enhancement, spectrum analysis, [and] speed correction," Owen issued a final report dated October 12, 2003, concluding that the recordings of the three conversations he ***507** examined were "original and authentic within the conversation, but contain some very questionable recording procedures and anomalies." App. at 1204, 1206. Owen's report indicated that both the March 13 and March 30 tapes had been started and stopped a number of times before the actual recording began, but that the internal integrity of the recorded conversations was intact. The report also noted that the conversation recorded on the March 30 tape was at times unintelligible.

5. *The Motion under the All-Writs Act*

Brown did not call an audio forensic expert as a witness during his trial to challenge the authenticity of the Noonan tapes, and he did not object to the tapes being admitted into evidence. Nevertheless, following his conviction on October 17, 2003, Brown, aided by a new team of attorneys, continued to examine the tapes of the Noonan conversations for signs of hidden edits or inaccuracies. On July 7, 2004, Brown filed a motion under the All Writs Act, 28 U.S.C. § 1651, to place under seal and compel the ex-

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[8] We at times will refer to the tapes of the March 13, March 30, and May 21 conversations that the government made available to Owen at the FBI's Harrisburg office as the "Harrisburg tapes." We sometimes will refer to the copies of the Harrisburg tapes that Owen downloaded onto his laptop as the "Owen laptop copies."

amination and review of the original audio and video recordings of the Noonan conversations.[9] In his motion, Brown argued that further examination, made subsequently to the trial, of the Owen laptop copies had "uncovered significant anomalies (suspicious acoustic events) which call into question the authenticity and originality of these tapes." App. at 636. In support of his motion, Brown attached reports from Allen and Owen and an affidavit from James Reames, a former FBI forensic technician.[10]

In a Memorandum and Order dated August 16, 2004, the District Court denied Brown's motion because (1) the Court found the timing of the motion suspect, (2) Brown did not make any suggestion that there were anomalies in the jury presentation, which was the only evidence actually considered by the jury, and (3) Brown's experts contended that only the third-generation copies-i.e., copies of the Owen laptop copies-contained anomalies in the conversation portion of the tapes. Because Owen's initial examination of the Owen laptop copies revealed anomalies only at the beginning of the tapes before the conversations began, the Court concluded that anomalies found in

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[9] Pursuant to the All Writs Act, "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651.

[10] It is unclear from the record whether Allen's and Owen's reports submitted in support of Brown's motion are those of September 17, 2003, and October 12, 2003, respectively. But we are not concerned with this uncertainty because Brown is not appealing from the District Court's denial of his motion under the All Writs Act.

the conversation portions of later generation copies were a product of duplication error.

6. *The Initial Motion for a New Trial*

Even though he had been convicted and the Court had denied his motion under the All Writs Act, Brown continued to employ Owen, Allen, and Reames to test the Owen laptop copies and the jury presentation. On May 31, 2005, Brown filed a motion pursuant to Rule 33 of the Federal Rules of Criminal Procedure for a new trial based on newly discovered evidence, or in the alternative, for (1) an order directing the government to produce to the defense for testing the original Nagra recorder and original Nagra SNST reel-to-reel audio tapes,[11] and the original VHS camcorder***508** and VHS video tapes of conversations between Brown and Noonan, and (2) an evidentiary hearing.[12] In support of this motion, Brown averred that his defense experts, "meticulously" had tested the Owen laptop copies and the jury presentation, and had concluded after "painstaking, time-consuming work" that the Harrisburg tapes proffered to Owen at the FBI offices were not original record-

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[11] The audio tapes of the Noonan conversations originally were recorded onto an analog recording device known as a Nagra SNST recorder. Federal law prohibits the possession of such recorders by private persons. *See* 18 U.S.C. § 2512(1)(b); App. at 1565.

[12] Although we refer to the May 31, 2005 motion as the initial motion for a new trial, Brown had filed an earlier motion for a judgment of acquittal pursuant to Fed.R.Crim.P. 29 and a new trial pursuant to Fed.R.Crim.P. 33 on more conventional grounds than those we discuss here. The District Court denied that motion on May 6, 2004, and Brown does not appeal from that order. Therefore we do not discuss that motion further.

ings, and that anomalies associated with computerized editing found in the Owen laptop copies and the jury presentation suggested that the government had edited both the Harrisburg tapes and the jury presentation. Consequently, Brown believed that the Harrisburg tapes and the jury presentation could not be deemed true and accurate records of the events that took place on the dates in question.

The government and the defense subsequently entered into an agreement, memorialized in an August 8, 2005 letter from defense counsel to AUSA Daniel, in which it agreed to provide the defense with the original audio and video tapes of the March 13, March 30, and May 21 Noonan conversations, a new set of FBI created first-generation duplicates of these recordings, the original Nagra SNST recorder on which the audio recordings of the conversations initially were made, and an additional working Nagra recorder. The letter agreement expressed the government's belief that the process of production should take no more than two weeks. On August 10, 2005, after being notified of the agreement, the District Court denied Brown's motion as moot, noting it also would be premature to rule on the motion at that time because Brown still was determining what, if any, newly discovered evidence existed.

7. *The Renewed Motion for a New Trial*

The government on November 9, 2005, released to the defense the original tapes of the March 13, March 30, and May 21 conversations, as well as a set of first-generation digital copies of those tapes that the

FBI made.[13] After extensive examination, testing, and comparison by Brown's experts of the July 2002 copies, the Owen laptop copies, the November 2005 tapes, the FBI archive copies, the original Nagra SNST recorder, and the video tapes used to create the jury presentation, Brown presented his experts' findings in support of a renewed Rule 33 motion for a new trial that he filed with the District Court on September 28, 2006.

According to Brown, these findings "confirmed what [he] suspected all along: the government intentionally withheld exculpatory material from the defense and misrepresented the authenticity of the tapes furnished to the defense and incorporated in the Jury Presentation." App. at 1231. Specifically, Brown contended that the government took the original analog recordings of the Noonan conversations, recorded them onto a digital format, deleted material exculpatory to Brown, and recorded the edited versions of the ***509** conversations from the digital format back onto the original analog reels. The government then presented modified analog tapes to the defense as originals (the Harrisburg tapes and the November 2005 tapes) or as the source of the generational copies that were presented to the defense (the July 2002 tapes and the FBI Archive copies) and used to create the jury presentation. Additionally, Brown averred in his motion that the November 2005 tape of the March 30 conversation "is far more audible" than

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[13] We at times will refer to the original tapes that the government released to the defense on November 9, 2005, as the "November 2005 tapes" and the first-generation digital copies released on the same date as the "FBI Archive copies."

previously disclosed recordings of the conversation, and that the newly audible portions of that conversation contained exculpatory material. App. at 1231-32. Brown alleged that the government violated his rights under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963),[14] and the Jencks Act, 18 U.S.C. § 3500,[15] by failing to disclose a full transcript or an audible version of the March 30 conversation.

In support of his renewed motion, Brown submitted new reports and affidavits from Reames, Allen, Owen, and a forensic video expert, Grant Fredericks. These submissions included two new transcriptions of the March 30 conversation, one prepared by Reames (the "Reames transcript") and another prepared by Allen (the "Allen transcript"). Brown

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[14] The Supreme Court held in *Brady* that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87, 83 S.Ct. at 1196-97. "The Supreme Court has outlined a three-part test to determine if a *Brady* violation has occurred: 'The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.' " *Lewis v. Horn,* 581 F.3d 92, 108 (3d Cir.2009) (quoting *Banks v. Dretke,* 540 U.S. 668, 691, 124 S.Ct. 1256, 1272, 157 L.Ed.2d 1166 (2004)).

[15] 18 U.S.C. § 3500(b) provides that "[a]fter a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to provide any statement ... of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified...."

claimed these transcripts revealed exculpatory material not disclosed previously.

Specifically, Brown argued that both transcripts revealed statements contradicting Noonan's trial testimony about a computer the SEC subpoenaed that allegedly had been used to create backdated severance letters. At trial, Noonan testified that Brown had stated in the March 30 conversation that the SEC "will never get [the] computer now. It is in the Atlantic." App. at 1249. In the Reames and Allen transcripts, however, this statement does not appear and it is Noonan who first mentions the Atlantic Ocean. Reames transcribed the relevant exchange as follows:

> **FRANKLIN BROWN**: There are [..][..] working on it.
>
> TIMOTHY NOONAN: In the Atlantic Ocean, huh?
>
> **FRANKLIN BROWN**: That was just an expression on his part..
>
> TIMOTHY NOONAN: I understand that.

App. at 1426. The conversation is transcribed similarly in the Allen transcript:

> TIMOTHY: OK Gottcha. (inaudible)
>
> FRANKLIN: Wo' What (inaudible)
>
> TIMOTHY: It's in the Atlantic Ocean!!!--- (pause).
>
> FRANKLIN: That was just an expression on his part. That's the equivalent.. (inaudible)
>
> TIMOTHY: I understand that

*510 App. at 2633. Brown also claimed that the Reames transcript contained Brown's previously undisclosed statements encouraging Noonan to be forthright in his discussions with the government. On appeal, however, Brown appears to concede that these statements were urging Noonan to be candid with Noonan's defense attorney, and at least were not urging Noonan directly to be candid with the government investigators. *See* Appellant's Op. Br. at 61.

In Allen's reports and affidavits submitted with Brown's motion, Allen explained his testing methodology and noted a number of anomalies on the different recordings. Allen's findings left him unable to "eliminate the possibility" that the November 2005 tapes were not recorded contemporaneously with the events taking place in them, or that the recordings originated from a digital source instead of the analog recording device that the government purportedly used. App. at 1272-73; App. at 2571. Additionally, Allen concluded "with a high degree of certainty" that the July 2002 copies and the Owen laptop copies differed considerably from the November 2005 tapes and the FBI archive copies, such that it would be "reasonable" to conclude that the November 2005 and FBI archive copies were, in fact, different recordings than the earlier disclosed copies. App. at 1273-74; App. at 2572-73.

Owen's materials contained similar findings. He concluded that the November 2005 tapes showed evidence of previous digitization inconsistent with an analog recording. Owen also was "not able to eliminate the possibility" that the Owen laptop copies and FBI archive copies originated from different sources.

App. at 2675. Allen and Owen also concluded that the video tapes that the government provided of the Noonan conversations contained evidence of editing.

Fredericks, in his affidavit, concluded that the video tapes the government provided to the defense were accurate originals, but that they had been converted into digital files and edited in order to create the jury presentation in such a manner that the resultant product was an "inaccurate and visually impaired reproduction" of the original video tapes. App. at 1468. Fredericks also concluded that the "[a]udio to video alignment of the DVD Jury Presentation was misaligned to such a degree that when the mouths of the men were moving, what was being heard by the jury, was not what they were actually saying at that exact time." App. at 1468.

The District Court held an evidentiary hearing on Brown's renewed Rule 33 motion on May 14 and 15, 2007. Over these two days, the District Court heard testimony from defense experts Owen and Allen, the government's FBI expert David Snyder, as well as from other persons including FBI case agents who had worked on the Rite Aid investigation. The government then sought an adjournment to seek discovery of the defense experts' test results and the District Court adjourned the hearing to allow additional discovery. The hearing resumed on August 13 and 14, 2007, and at that time the District Court again heard testimony from witnesses including Owen, Allen, Snyder, and Paul Ginsberg, a forensic audio consultant, who presented expert testimony on behalf of the government. Over the course of the four days of hearings, the District Court heard testimony from a total

of nine witnesses and accepted 27 exhibits into evidence.

On February 22, 2008, the District Court entered an order denying Brown's renewed motion for a new trial. In its comprehensive accompanying Memorandum, the Court detailed the history of the various recordings made of the Noonan ***511** conversations as well as the evidence the numerous experts proffered, and concluded that the tapes the government provided were authentic, and that the government did not submit false evidence or perjured testimony to the jury. The Court also found that the Reames and Allen transcripts of the March 30 conversation did not contain exculpatory or impeaching information, and it therefore held that the government had not committed a *Brady* or Jencks Act violation in delaying the delivery of an audible recording or transcript of that conversation. The Court also concluded that a new trial was unwarranted because Brown's supposed "new evidence"-a transcript of the previously inaudible March 30 statements-was not in fact newly discovered. *See United States v. Brown,* No. 1:02-CR-00146-2, 2008 WL 510126, at *28 (M.D.Pa. Feb.22, 2008).

8. *The District Court Did Not Abuse its Discretion*

We will reverse a denial of a Rule 33 motion for a new trial based on newly discovered evidence only if we conclude that the district court abused its discretion in denying the motion. *United States v. Saada,* 212 F.3d 210, 215 (3d Cir.2000). We have explained that "a district court abuses its discretion if its decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of

law to fact." *Montgomery v. Pinchak,* 294 F.3d 492, 498 (3d Cir.2002) (internal quotation marks and citation omitted). Federal Rule of Criminal Procedure 33 provides that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Our precedents instruct that five requirements must be met before a district court may grant a new trial on the basis of newly discovered evidence:

> (a) the evidence must be in fact, newly discovered, i.e., discovered since the trial;
>
> (b) facts must be alleged from which the court may infer diligence on the part of the movant;
>
> (c) the evidence relied on, must not be merely cumulative or impeaching;
>
> (d) it must be material to the issues involved; and
>
> (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.

United States. v. Cimera, 459 F.3d 452, 458 (3d Cir.2006) (quoting *United States v. Iannelli,* 528 F.2d 1290, 1292 (3d Cir.1976)). A movant seeking a new trial on the basis of newly discovered evidence bears a "heavy burden" in proving each of these requirements. *Id.* (citing *Saada,* 212 F.3d at 216).

We find no basis to conclude that the District Court abused its discretion in denying Brown's Rule 33 motion. Even if we assume for the sake of argument that Brown through his epic efforts after the trial satisfied the first four *Iannelli* factors listed

above, in light of the Court's properly found facts, Brown failed to prove that his newly discovered evidence probably would result in his acquittal at a new trial.[16]

*512 After considering voluminous amounts of briefing, expert reports, and live testimony, the District Court made a factual finding that the various tapes of the Noonan conversations had not been "edited, altered, digitized, or manipulated by the government at any time," and that, accordingly, "[t]hey [were] authentic recordings." *Brown,* 2008 WL 510126, at *25. Brown claims that this finding of authenticity was clearly erroneous because (1) the Court based the finding solely on Ginsburg's expert testimony and the Court should not have allowed Ginsburg to testify, (2) even considering Ginsburg's testimony, the evidence did not support the finding of authenticity, and (3) evidence of breaks in the tapes' chain-of-custody further undermined the finding of authenticity.

Brown argues with respect to the first point that the government's request for an adjournment of the evidentiary hearing and subsequent use of Ginsburg

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[16] Actually it is questionable whether the evidence Brown presents in his attempt to show that the tapes had been altered is "newly discovered," and whether he was diligent in seeking it before the trial. If there had been alterations in the tapes as Brown believes, he should have known of them when he first heard the tapes and, indeed, he contends that he suspected from the outset that the tapes were inaccurate. Thus, he could have and should have developed his expert testimony before the trial. Instead, based on the advice of counsel, he did not take steps prior to trial to demonstrate that the tapes contained alterations of the sort allegedly discovered following his conviction.

as an expert was part of "a subterfuge seemingly designed to avoid having an FBI agent testify under oath that the tapes had not been altered," and that the District Court abused its discretion by allowing the government to engage in this subterfuge. Appellant's Op. Br. at 40. We are perplexed by this argument because, as the District Court found, there was testimony from FBI agents that the tapes had not been altered. In any event, the government claims that it sought the adjournment to obtain the test results from Owen and Allen in order to cross-examine them effectively, and that it based its decision to use Ginsburg on a perceived need to counter Brown's evolving allegations of evidence tampering with testimony from an independent expert, as opposed to testimony from a government employee (i.e., Snyder). Ultimately, the Court granted the adjournment to allow additional discovery, required Snyder to testify, and allowed Ginsburg to testify. The Court went to great lengths to consider all the evidence relevant to the issues before it, and we cannot conclude that the Court abused its discretion in making its determination to allow Ginsburg's testimony over Brown's objection, in addition to that of Snyder, Owen, Allen, and the other witnesses.

We also are unable to find any error in the District Court's conclusion that the tapes were authentic. As the Court noted, Brown's experts' detailed findings led them only to the lukewarm conclusions that it would be "reasonable" to believe that earlier disclosed recordings of the Noonan conversations came from a different source than the November 2005 tapes, and that the possibility the recordings were inauthentic

could not be eliminated. While a different fact-finder might have reached a conclusion contrary to the one the Court reached, the record by no means compels a conclusion that the tapes were inauthentic. Given the history of the proceedings and the conflicting expert testimony, both between the government and defense experts and among the defense experts themselves, we cannot conclude that the Court clearly erred by finding the challenged tapes were authentic.[17]

It also is important to consider that, as the District Court explained, it had evidence "from the FBI agents, that they did not themselves, or cause another person to, edit, alter, or modify the original tapes except to attempt enhancement" and that ***513** this testimony "was credible." *Brown,* 2008 WL 510126, at *25. Certainly in the face of somewhat conflicting expert testimony this lay evidence was important and the Court could rely on it.

Even were we to reject the District Court's finding and hold the tapes inauthentic, Brown does not demonstrate, or even seriously contend, that any of the conversations allegedly removed by the government from the Noonan tapes actually was exculpatory, much less that their admission as trial evidence probably would have resulted in his acquittal. Moreover, even if we presumed that the government would not expend the effort to tamper with evidence in the manner ascribed to it by Brown to remove statements that were not exculpatory, Brown still bears the

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[17] We see no reason with respect to the chain-of-custody issues Brown raises to second-guess the District Court's determination that the testimony of the government's witnesses on this point was credible.

"heavy burden" of demonstrating that his newly discovered evidence probably would result in his acquittal at a new trial, and he simply did not meet this burden. Assuming Brown's argument to be that if we make a finding that the tapes were inauthentic the consequence would be the suppression of all of the video and audio recordings of the Noonan conversations, it does not follow *a fortiori* that a new trial without the recordings probably would result in Brown's acquittal, or that the original trial would have had a different outcome if the video and audio recordings had been excluded from evidence at that trial. As the District Court noted, Noonan testified at trial about his conversations with Brown, and "was cross examined thoroughly, on all topics that might impugn his credibility." *Brown,* 2008 WL 510126, at *28. The Court described the evidence at trial of Brown's guilt to be "concrete, credible, and more than sufficient to sustain his conviction." *Id.* On appeal, Brown fails to challenge this observation and plausibly explain how the absence of the Noonan tapes would have rendered the evidence at his original trial or would render the evidence at a new trial less than sufficient to sustain his conviction.

We agree with the District Court's conclusion with respect to the allegedly exculpatory statements in the Reames and Allen transcripts of the March 30 conversation that the statements were, at best, neutral as to Brown's guilt or innocence and not exculpatory. The statements regarding the Atlantic Ocean do not contradict substantially Noonan's testimony on which Brown's counsel thoroughly cross-examined him at the trial. Moreover, we disagree with Brown's argu-

ment that because attorneys have ethical obligations not to suborn perjury, *see Nix v. Whiteside,* 475 U.S. 157, 171-74, 106 S.Ct. 988, 996-97, 89 L.Ed.2d 123 (1986), Brown's statement urging Noonan to be candid with Noonan's lawyer is akin to a statement urging Noonan to confess wrongdoing at Rite Aid to the government. Therefore, even if the government could have produced a more audible version of the March 30 conversation, it is unlikely that the use of this version would have led to Brown's acquittal at his trial or would lead to his acquittal at a new trial. For the same reason, we agree with the District Court that the government did not commit a *Brady* violation and that any violation of the Jencks Act amounted to harmless error.

Finally, Brown's evidence with respect to the video tapes and the jury presentation suggests only that the government could have created a more polished presentation if it had the resources of Brown and his experts at its disposal.[18] At trial, ***514** Brown conceded that the video tapes and jury presentation were accurate representations of the events recorded, and, on appeal, Brown does not offer any evidence which could give rise to an inference that exculpatory material on the video tapes somehow was hidden from him. Accordingly, we will affirm the order denying Brown's motion for a new trial entered by the District Court on August 10, 2005, and the order denying Brown's renewed motion for a new trial or for dismis-

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[18] Frequently our review of criminal cases makes it clear that the government's resources devoted to the trial exceeded those of the defendant. This case does not seem to be within that category.

sal of the indictment entered by the District Court on February 22, 2008.

B. The Pre-Trial Suppression Motion

Prior to the trial, Grass and Brown filed a motion to suppress the tapes of the Noonan conversations, arguing that the government had obtained them in violation of the 1998 "McDade Amendment," the provisions of which we describe below, by reason of AUSA Daniel, a government lawyer, having violated the Pennsylvania Rules of Professional Conduct by using Noonan as his proxy to elicit information from Grass and Brown about the subject matter of the government's investigation prior to their indictment but at a time when Daniel knew that they were represented by counsel with respect to that investigation. After holding a suppression hearing, the District Court issued an opinion on January 13, 2003, denying Grass's and Brown's motion. The Court held that AUSA Daniel had not committed an ethical violation by using Noonan as a confidential informant, and that, even if he had done so, suppression was not an appropriate remedy for the violation. *See United States v. Grass,* 239 F.Supp.2d 535, 549 (M.D.Pa.2003). We review a district court's denial of a suppression motion for clear error as to the underlying facts, but exercise plenary review with respect to legal findings made in light of the district court's properly found facts. *United States v. Coles,* 437 F.3d 361, 365 (3d Cir.2006) (citing *United States v. Givan,* 320 F.3d 452, 458 (3d Cir.2003)).

At the time of the alleged violations, Rule 4.2 of the Pennsylvania Rules of Professional Conduct, known as the "no-contact rule," provided:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Pa. R. Prof'l Conduct 4.2.[19] Rule 8.4(a) provides that an attorney has engaged in misconduct if he violates the Pennsylvania Rules of Professional Conduct through the acts of another. Pa. R. of Prof'l Conduct 8.4. Pursuant to the McDade Amendment an attorney that the federal government employs is subject to the ethical rules in each state where such attorney engages in that attorney's duties to the same extent and in the same manner as any other attorney in that state. 28 U.S.C. § 530B(a). Accordingly, AUSA Daniel, a federal prosecutor in this Pennsylvania-based prosecution, was bound by Rule 4.2 at all times relevant to this appeal, and he ethically was not permitted to violate Rule 4.2 through the acts of a surrogate.

The government does not dispute seriously that at the time the Noonan conversations were recorded, Brown was a "party"*515 within the meaning of Rule 4.2 as that rule is interpreted in Pennsylvania, or that Brown was represented by counsel and AUSA Daniel was aware of that representation. The question before us then is whether AUSA Daniel was "authorized by law" to use a confidential informant to communicate with a represented suspect in the

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[19] An August 23, 2004 order amended Rule 4.2 to substitute "person" for "party" and "to do so by law or a court order" for "by law to do so." Pa. R. of Prof'l Conduct 4.2, historical notes.

course of a pre-indictment investigation. Relying largely on our decision in *United States v. Balter*, 91 F.3d 427 (3d Cir.1996), the District Court answered this question in the affirmative.

In *Balter*, we found that a federal prosecutor did not violate New Jersey's no-contact rule[20] when he used a confidential informant to contact a represented person in the course of a pre-indictment investigation. We reached that conclusion because the rule did not apply to a criminal suspect prior to the commencement of adversarial proceedings against the suspect, and that even if the rule did apply, "pre-indictment investigation by prosecutors is precisely the type of contact exempted from the Rule as 'authorized by law.' " *See id.* at 435-36. After noting that New Jersey case law supported this latter point, we stated:

> Prohibiting prosecutors from investigating an unindicted suspect who has retained counsel would serve only to insulate certain classes of suspects from ordinary pre-indictment investigation. Furthermore, such a rule would significantly hamper legitimate law enforcement operations by making it very difficult to investigate certain individuals.

Id. at 436. We then observed that decisions of every other court of appeals to have considered a similar

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[20] The New Jersey rule provided at the time of *Balter* that "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless authorized by law to do so." *Balter*, 91 F.3d at 435 (quoting N.J. R. of Prof'l Conduct 4.2).

case have supported this conclusion except for a decision of the Court of Appeals for the Second Circuit. *Id.* (citing *United States v. Powe,* 9 F.3d 68 (9th Cir.1993); *United States v. Ryans,* 903 F.2d 731 (10th Cir.1990); *United States v. Sutton,* 801 F.2d 1346 (D.C.Cir.1986); *United States v. Dobbs,* 711 F.2d 84 (8th Cir.1983); *United States v. Weiss,* 599 F.2d 730 (5th Cir.1979)). The Court of Appeals for the Second Circuit concluded in *United States v. Hammad,* 858 F.2d 834, 839-40 (2d Cir.1988), that a federal prosecutor overstepped the boundaries of legitimate preindictment investigation by preparing a false grand jury subpoena to aid a confidential informant elicit admissions from a represented suspect.

Brown contends that *Balter* is distinguishable from this case because it dealt with the New Jersey rather than Pennsylvania ethical rules, was decided prior to the enactment of the McDade Amendment, and the government's conduct in the present case is far more egregious than the government's conduct in *Balter.* We find these distinctions unavailing. To begin, New Jersey's no-contact rule is virtually identical to Pennsylvania's, and both states have derived their version of the rule from the American Bar Association's Model Rules of Professional Conduct.[21] *See*

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[21] We note that New Jersey's rule has been interpreted to apply only after the initiation of formal adversarial proceedings, whereas Pennsylvania's rule is not so limited. *See Balter,* 91 F.3d at 436 (citing *State v. CIBA-GEIGY Corp.,* 247 N.J.Super. 314, 589 A.2d 180, 183 (1991)). This distinction in the overall coverage of the two rules, however, has no bearing on the scope of the "authorized by law" exception found in both rules, although in this case the alleged violation took place prior to the initiation of adversarial proceedings. It is worth noting, howev-

*516*Balter*, 91 F.3d at 435 n. 4. We recognize that Brown correctly points out that we supported our holding in *Balter* that pre-indictment investigations by prosecutors were "authorized by law" with a citation to a decision from an intermediate New Jersey state appellate court for which there is no analogous Pennsylvania decision. *See id.* at 436 (citing *State v. Porter*, 210 N.J.Super. 383, 510 A.2d 49, 54 (1986)). But our conclusion in *Balter* did not rest solely on the New Jersey state court decision and we do not believe the absence of an analogous Pennsylvania decision renders any less compelling our observations regarding the negative consequences that would follow from an outcome contrary to that we reach here.

We recognize that Congress passed the McDade Amendment in part to combat perceived abuses by federal prosecutors and require them to comply with state no-contact rules. *See generally* Note, *Federal Prosecutors, State Ethics Regulations, and the McDade Amendment*, 113 Harvard L.Rev.2080 (2000). But Congress did not enlarge on the type of conduct that state rules forbid. Our inquiry therefore would be no different if AUSA Daniel had been a state prosecutor and we were entertaining an appeal from a state court conviction. Nevertheless Brown argues that the McDade Amendment "supersedes cases such as *Balter* by making a particular state's rules, rather than general principles of ethics, applicable to the conduct of the federal prosecutor," and that, accordingly, AUSA Daniel ran afoul of Rule 4.2

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er, that in New Jersey there would be that additional reason to hold that there had not been an ethical violation in the circumstances of this case.

because of the absence of a Pennsylvania statute or court decision expressly authorizing the conduct in which he engaged. Appellant's Op. Br. at 69. But we reject his argument because we do not believe the McDade Amendment prohibits federal prosecutors in Pennsylvania from using a well-established investigatory technique simply because the Pennsylvania courts have not considered whether such conduct is permissible. After all, the Pennsylvania courts have *not* held that such conduct is impermissible.[22]

Finally, though we acknowledge that the government's conduct in investigating Brown gives us pause, we do not regard it as so egregious that it falls outside the realm of acceptable pre-indictment investigation. Although the government created a fictitious letter addressed to Noonan's counsel that Noonan showed to Brown in order to guide the topics of the March 30 conversation, Brown voluntarily agreed to the March 30 meeting with Noonan, the government's letter did not invoke the authority of the District Court or contain any forged signatures, the letter was not addressed to Brown, and the letter in no way purported to compel any action or inaction on Brown's behalf. Accordingly, we agree with the District Court that AUSA Daniel did not violate Rules 4.2 and 8.4(a) of the Pennsylvania Rules of Professional Conduct. Inasmuch as Brown, or for that matter any other government agent, did not commit an ethical violation in this case with respect to the fictitious letter or the March 30 meeting, the District

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[22] At least Brown has not cited to us any Pennsylvania case so holding and our research has not revealed that there is any such case.

Court properly denied Brown's pre-trial suppression motion.[23]

***517** C. The Plea Agreement

Brown next seeks a vacatur of his sentence and a remand for resentencing in accordance with a proposed plea agreement that he reached with the government because of the manner in which the District Court dealt with the agreement. Specifically, Brown argues that the District Court violated Rule 11 of the Federal Rules of Criminal Procedure by participating in the plea discussions between Brown and the government, and that the Court abused its discretion by improperly rejecting the plea agreement. If the Court had accepted the plea agreement the sentence that it could have imposed would have been shorter than the sentence it did impose following Brown's conviction at trial.

1. *The Terms of the Agreement*

By June 17, 2003, Grass and Bergonzi had entered into plea agreements with the government and agreed to cooperate in its investigation. Pursuant to the agreements, Bergonzi pled guilty to one count of conspiracy, and Grass pled guilty to two counts of conspiracy.[24] On June 24, 2003, several days before Brown's trial was set to begin before Judge Sylvia H.

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[23] We also agree with the District Court's conclusion that even if there had been an ethical violation, suppression would not have been the appropriate remedy. *See, e.g., Hammad,* 858 F.2d at 841-42 (although prosecutor had violated New York's no-contact rule by using "sham" grand jury subpoena to elicit admissions from represented suspect, the district court abused its discretion by ordering suppression as result of violation).

[24] Sorkin pled guilty on June 26, 2003.

Rambo, Brown also entered into a plea agreement with the government. Under this agreement, Brown agreed to plead guilty to one count of conspiracy to obstruct justice, an offense carrying a maximum term of imprisonment of five years. The government agreed that upon entry of Brown's guilty plea, it would move to dismiss all of the remaining counts in the indictment against him.

The plea agreement further provided that if Brown adequately could demonstrate his acceptance of responsibility, the government would move at sentencing for a 3-level reduction in Brown's offense level under the United States Sentencing Commission Guidelines (the "Sentencing Guidelines" or "Guidelines") because Brown had "assisted authorities in the investigation and prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate its resources efficiently." App. at 439. The agreement also took into account Brown's pledge to cooperate with the government in its ongoing investigation and prosecution of the **Rite** Aid matter, and raised the possibility that if the government believed Brown had rendered it "substantial assistance," the government would recommend, pursuant to Section 5K1.1 of the Sentencing Guidelines, that the District Court impose a sentence on Brown below the applicable Guidelines range.

2. *Judge Rambo's Letter*

After receiving a courtesy copy of Brown's plea agreement on June 25, Judge Rambo sent a letter to

AUSA Daniel, with a carbon copy to Brown's trial counsel, stating the following:

> As you are aware, I have decided to reject the proposed plea agreement which has been forwarded to my chambers. However, I will accept Mr. Brown's plea of guilty to Count 33 [for conspiracy to obstruct justice]. Attached to this letter, you will find a statement of reasons for rejecting the agreement. I am planning on reading *518 this statement in open court tomorrow. If you should have any questions, please contact me.

App. at 25. In the attached statement of reasons, Judge Rambo recited that the plea agreement was unacceptably lenient given the diverse range of serious crimes with which Brown was charged. Judge Rambo further found "particularly nauseating" the portion of the agreement indicating that Brown's timely acceptance of responsibility had allowed the government and the Court to allocate its resources efficiently. Judge Rambo understandably took that view of the acceptance of responsibility provision of the plea agreement because Brown did not agree to plead guilty until almost the eve of trial, i.e., between two and eight years after the conduct at issue took place. After noting that the government's proposal to drop all the other charges against Brown "essentially caps his prison sentence at 60 months," Judge Rambo stated that the proposed plea agreement "does nothing to eviscerate" the public's "perception that white collar defendants are given preferential treatment in our system of justice." App. at 29-30. Judge Rambo concluded her statement of reasons for rejecting the

plea agreement by stating: "I must distance myself and the judiciary from this agreement. I will not accept this plea agreement." App. at 30.

3. *The Chambers Meeting*

The following morning on June 26, 2003, Judge Rambo held a meeting in her chambers to discuss Brown's plea situation with Brown's trial defense team and representatives from the United States Attorney's Office, including United States Attorney Thomas Marino. Obviously Judge Rambo's letter with the statement of reasons for rejecting the plea agreement had jolted the attorneys in the case. Brown's lead trial counsel, Reid Weingarten, began the meeting by explaining that as a result of Judge Rambo's letter, Brown was unwilling to plead guilty because he no longer believed he had a "fair shot" to argue for leniency in sentencing from the District Court. *Id.* at 453. Weingarten requested a continuance of the trial "to catch our breath" and attempt to "salvage th[e] deal." App. at 452. The government joined the defense's request for a continuance.

Over the course of the meeting, Marino made three statements that Brown characterizes as references to an ex parte conversation about Brown's case that the United States Attorney's Office had with Judge Rambo June 25, 2003. In one reference, Marino stated, "As an aside, I had a concern when the Court raised an issue-what you said to us yesterday as to was I giving away the farm? Because there is nothing I want more in this case than the Court to say that this is a fair and just agreement." *Id.* at 459. Marino then asked whether a "preliminary guideline check" that Judge Rambo stated the Court had made with the

Probation Office had resulted in a Sentencing Guidelines calculation different from that the government had provided in the plea agreement. *Id.* at 458-59. After Judge Rambo indicated that the Probation Office indeed had come up with a different calculation, Marino responded, "That is what I think the problem is. I am hoping that the facts we discussed with the Court yesterday and facts that we may be able to bring to the Court's attention in the future once we get-if we do get these continuances will resolve that matter." *Id.* at 460. Brown's attorney did not raise any objection to the Court proceedings at the meeting or at any time prior to this appeal on the ground that there had been ex parte or improper contacts between the government and the Court.

***519** Following Marino's statements, Judge Rambo expressed her perception that, based on the facts known to her, Brown and Grass seemed equally to blame for the wrongdoing at Rite Aid, and that she did not understand why the government was treating Brown more favorably than Grass. Judge Rambo continued, "Now if there are facts that you have that you are going to present that wipe away that perception, then fine. I don't have that." *Id.* at 460.

Despite Judge Rambo's reservations, the transcript of the chambers conference suggests that during the period between when she sent the parties her letter and statement of reasons and the following day's conference, she had become more willing to consider accepting Brown's plea agreement. On one occasion, Judge Rambo stated she had "no problem accepting the plea" and that even if she did not accept the agreement, Brown would not receive a sentence

heavier than he otherwise would receive, so long as the District Court's Guidelines calculation comported with that arrived at by the government. *Id.* at 458. On the second occasion, Judge Rambo stated she had "no problem with the plea," but that she "wanted to see what the guidelines were and then look at the plea in conjunction with the presentence report" as she had done with Grass. *Id.* at 461. Additionally, Judge Rambo never read aloud her statement of reasons for rejecting the plea agreement even though her June 25 letter indicated her intent to do so. Nevertheless, Weingarten concluded the chambers meeting by reiterating that, in light of Judge Rambo's June 25 letter and statement of reasons, Brown was unwilling at that point to enter a guilty plea.

Several hours after the June 26 meeting, Judge Rambo entered an order granting Brown until July 14, 2003, to notify the Court of his plea decision. Of course, inasmuch as Brown did not plead guilty, the case ultimately proceeded to trial. The record does not reflect that there were any further plea negotiations between Brown and the government following the chambers conference and does not reveal how Brown communicated his decision not to enter a guilty plea to the Court.

4. *Application of Rule 11(c)(1)*

Brown first contends that the District Court violated Rule 11(c)(1)'s prohibition on judicial participation in plea negotiations. That rule allows an attorney for the government to discuss and reach a plea agreement with the defendant's attorney, but provides that "[t]he court must not participate in these discussions." Fed.R.Crim.P. 11(c)(1). When a defen-

dant makes a Rule 11 objection for the first time on appeal, a court of appeals reviews the alleged violation on a plain error basis.[25] To succeed under this standard of review, a defendant must demonstrate that (1) the asserted violation of Rule 11(c)(1) was error, (2) the error was plain, and (3) the error affected the defendant's substantial rights; if these three conditions are met, then a court may exercise its discretion to notice the forfeited error, but only if (4) "the error seriously affect[s] the fairness, integrity, or public reputation of judicial*520 proceedings." *See United States v. Bradley,* 455 F.3d 453, 461 (4th Cir.2006) (quoting *United States v. Olano,* 507 U.S. 725, 731-32, 113 S.Ct. 1770, 1776, 123 L.Ed.2d 508 (1993)).

Brown claims the District Court violated the "core values" of Rule 11 by holding ex parte discussions with the government on the day that the Court received the plea agreement, and that the Court violated the letter of Rule 11(c)(1) by agreeing at the chambers conference to the government's proposal to provide further factual information which might lead

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[25] If there is a timely objection in the district court to an alleged Rule 11 violation, a court of appeals exercises plenary review in determining whether there had been a violation. *United States v. Ebel,* 299 F.3d 187, 190-91 (3d Cir.2002). Nevertheless, a court of appeals still will consider the record as a whole to determine whether the error affected a defendant's substantial rights or was merely harmless. *See id.* at 191; Fed.R.Crim.P. 11(h). We note that the use of the plain error standard is not without its critics. *See United States v. Baker,* 489 F.3d 366, 371-72 (D.C.Cir.2007). Here, however, our result would be the same regardless of whether we exercise plain error or plenary review.

the Court to later accept the agreement. Appellant's Op. Br. at 85.

According to the government, the record does not establish that there were any ex parte discussions between the government and the District Court, and that even if there were such discussions, Brown did not raise a contemporaneous objection when he became aware of them, and he cannot establish now that as a result of those discussions there was plain error. The government also contends that the Court did not involve itself improperly in the plea discussions, noting that the Court's alleged involvement arose after Brown had entered into the plea agreement with the government.

The courts have viewed Rule 11's ban on judicial participation in plea agreements as serving several purposes:

> First, it diminishes the possibility of judicial coercion of a guilty plea, regardless whether the coercion would actually result in an involuntary guilty plea. Second, the judge's involvement in the negotiations is apt to diminish the judge's impartiality. By encouraging a particular agreement, the judge may feel personally involved, and thus, resent the defendant's rejection of his advice. Third, the judge's participation creates a misleading impression of his role in the proceedings. The judge's role seems more like an advocate for the agreement than a neutral arbiter if he joins in the negotiations.

United States v. Baker, 489 F.3d 366, 370-71 (D.C.Cir.2007) (*quoting United States v. Cannady,*

283 F.3d 641, 644-45 (4th Cir.2002)). We consider Brown's Rule 11(c)(1) challenge in light of these purposes.

The record, in particular Judge Rambo's June 25, 2003 letter to AUSA Daniel and Marino's statements at the chambers conference the next day, permits an inference that the government communicated with the District Court on June 25, 2003-the day it forwarded the plea agreement to the Court and the day before the chambers conference-although the context of these communications if they did occur is not immediately apparent. The government attempts to deny that there were such communications, arguing that the statements in the record are susceptible to multiple interpretations and that it would have been "extremely unlikely" and "foolish" for Marino to mention such conversations in the presence of defense counsel. *See* Appellee's Br. at 78-79.[26] Assuming that there were ex parte communications, however, Brown's experienced counsel apparently did not view them as problematic, *521 or at least decided not to object to them if he did view them as improper, as he did not raise any objection either upon receiving

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[26] We take the government's point to be that, since an ex parte communication clearly would have been improper, Marino's comments could not mean that such communications took place because no one would be inclined to admit to that kind of ethical breach. We do not take the government's suggestion to be that if it had engaged in improper conduct the wise approach for it thereafter would have been to keep quiet about what had happened. We trust that if the government came to recognize that it had acted improperly in a prosecution, it would reveal the facts and then let the matter proceed to an appropriate outcome.

Judge Rambo's June 25 letter or upon hearing Marino's statements at the chambers conference on June 26 or at any time thereafter.[27]

After our study of the record of what happened after Judge Rambo sent her June 25 letter, we are satisfied that Judge Rambo did not violate Rule 11(c)(1) as neither the alleged ex parte communications nor Judge Rambo's statements at the chambers conference took place until after Brown and the government had finalized the plea agreement. *See Baker*, 489 F.3d at 371 (there is "no room for doubt" that the "purpose and meaning" of Rule 11(c)(1)'s injunction on judicial involvement in plea negotiations "are that the sentencing judge should take no part whatever in any discussion or communication regarding the sentence to be imposed prior to ... submission to him of a plea agreement") (quoting *United States v. Werker*, 535 F.2d 198, 201 (2d Cir.1976)). Here, by June 25, 2003, the plea negotiations were over and there was no risk that judicial pressure was going to influence the outcome of those negotiations. Moreover, it is unclear how any ex parte conversations would have harmed Brown given the government's attempt persuade the Court to accept the plea bargain to which Brown had agreed.

Rule 11(c)(1) seeks to avoid a situation in which a court places pressure on a defendant to plead guilty involuntarily. In this case, Judge Rambo's position led to the collapse of the plea agreement and had the opposite effect. Thus, though Brown may have lost

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[27] Brown's attorneys on this appeal were not representing him in June 2003.

the benefit of his bargain with the government because of Judge Rambo's position, he did not lose his right to be tried by an impartial jury of his peers and he surely was not coerced to plead guilty. In fact, quite to the contrary, Judge Rambo's actions caused him to adhere to his previously entered plea of not guilty even though he had been prepared to change his plea to guilty. Accordingly, even if we agreed with Brown that Judge Rambo violated the letter of Rule 11(c)(1) by discussing the plea negotiations at the chambers conference and agreeing to allow the government to provide additional factual information in support of a plea agreement, such error was harmless given that the parties did not reach a subsequent plea agreement. *See* Fed.R.Crim.P. 11(h).

5. *Abuse of Discretion Standard*

Brown also contends that the District Court improperly rejected the plea agreement by distributing the letter to AUSA Daniel with the attached "statement of reasons" to counsel on June 25, 2003. On this point we first observe that the record by no means is clear that the Court ever rejected the plea agreement. The reality may be that Brown simply abandoned the agreement when he became aware of the Court's view of it. However, assuming that the letter and statement of reasons constituted a rejection of the plea agreement, we review the District Court's rejection of Brown's plea agreement for an abuse of discretion. *See United States v. Hecht,* 638 F.2d 651, 658 (3d Cir.1981) (Weis, J., dissenting) (citing *Santobello v. New York,* 404 U.S. 257, 262, 92 S.Ct. 495, 498, 30 L.Ed.2d 427 (1971)); *see also Government of the Virgin Islands v. Walker,* 261 F.3d 370, 375 (3d

Cir.2001) ("A sentencing court can, of course, reject the results of a plea negotiation if it concludes that the resulting agreement is not in the best interest of justice.").

*522 On the question of whether the District Court rejected the plea agreement it is clear that, on its face, Judge Rambo's June 25 letter and her accompanying "statement of reasons" would lead most reasonable readers to believe that the rejection of Brown's plea agreement was a foregone conclusion. By the next day, however, Judge Rambo clearly indicated a willingness to consider the plea agreement at the chambers conference. In this regard the record indicates that when Judge Rambo originally read that the plea agreement suggested that Brown's timely acceptance of responsibility had permitted the Court to allocate its resources efficiently, she reacted negatively, but by the next day she had softened her views.

Yet we need not determine if Judge Rambo actually rejected the plea agreement for even if we construe the "statement of reasons" as a formal rejection, she did not abuse her discretion in rejecting the agreement. Brown argues that Judge Rambo in issuing her "statement of reasons" abused her discretion because she displayed a predisposition to find Brown guilty and impose a substantial penalty, and because she improperly based her decision to reject the plea agreement on the circumstance that she and her staff had spent substantial time and effort preparing for

Brown's trial.[28] We disagree. The grand jury charged Brown with an array of felonies which allegedly resulted in very serious financial harm to the Rite Aid Corporation and its shareholders, as well as obstruction of justice and witness tampering. The indictment charged Brown and Grass equally, and alleged they both were more culpable than Bergonzi and Sorkin. Yet the government in Judge Rambo's view inexplic-

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[28] Brown also makes the novel assertion that once the District Court acknowledged the government's prerogative to dismiss certain counts in the indictment against Brown-i.e., the counts other than Count 33 for conspiracy to obstruct justice-the plea agreement became a Rule 11(c)(1)(B) agreement that the Court was compelled to accept. *See* Fed.R.Crim.P. 11(c)(3)(A) (court has discretion to reject agreements under Rule 11(c)(1)(A) and (c)(1)(C)); *In re Richards*, 213 F.3d 773, 784-89 (3d Cir.2000) (narrowly construing Rule 48's requirement that "leave of court" be obtained before a prosecution may be dismissed). With the exception of *Richards*, which did not involve plea agreements, Brown does not cite authority for this position. In any event, Brown's argument fails at the outset because, although the Court in its June 25 letter to AUSA Daniel did state it would accept Brown's guilty plea to Count 33, it did so while expressing its intention to reject all other aspects of the agreement. Moreover, even though the Court at the next day's chambers conference did seem willing to accept the entire plea agreement, it never acknowledged that the government possessed a unilateral right to dismiss the remaining counts in the indictment because the plea agreement did not grant the government any such right. In the agreement, the government agreed to *move* to dismiss the remaining counts upon entry of Brown's guilty plea to the conspiracy count. Dismissal still hinged on the Court's granting of the government's motion, which it never could do because the government never filed the motion. Hence, the agreement remained subject to Rule 11(c)(1)(A) and thus the Court had discretion to accept, reject, or defer a decision on the agreement until after its review of the presentence report. *See* Fed.R.Crim.P. 11(c)(3)(A).

ably offered Brown a significantly more lenient plea agreement than it did Grass. Although Judge Rambo spoke harshly in describing why she felt Brown's plea agreement did not serve the interests of justice, if she actually rejected the plea agreement she did not abuse her discretion by so doing.

Brown draws our attention to Judge Rambo's statement that she found "particularly nauseating" the portion of the plea agreement indicating that the government would move for a reduction in Brown's offense level because Brown's timely acceptance of responsibility had allowed*523 the government and the District Court to allocate their resources efficiently. Judge Rambo noted that Brown's decision to enter a plea agreement on almost the eve of trial had by no means prevented the Court and its staff from expending considerable effort preparing for trial. Brown reads these statements to mean that Judge Rambo rejected the plea agreement because of the time the Court had spent on trial preparation. Though we can understand why a district court would be frustrated if, after it expended great efforts to prepare for a trial, the parties in effect settled the case, as the court might wonder why they could not have reached their agreement earlier, we agree that ordinarily it would be improper for a court to reject a plea agreement solely because of its annoyance attributable to the parties' delay in reaching an agreement.[29] The record demonstrates, however, that Judge Rambo's comments regarding timing referred specifically to the

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[29] We are not suggesting that there never could be a situation in which a court appropriately could not reject a plea agreement on the basis of its untimeliness.

proposed Sentencing Guidelines 3-level reduction for Brown's timely acceptance of responsibility, and not to the acceptability of the plea agreement generally. Judge Rambo's hostility to this proposed reduction, though expressed harshly, was certainly understandable given the circumstances of the case of which she was well aware. In fact, we, too, cannot understand how the parties seriously can have recited in the plea agreement that Brown's acceptance of responsibility was timely. After considering all of Brown's arguments, we find no abuse of discretion in the District Court's reaction to Brown's plea agreement.

D. The Sentence

The District Court sentenced Brown, who was 76 years old, to a ten-year term of imprisonment. Brown argues that he is entitled to a remand for resentencing because this sentence, which the Court imposed after the Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), but before its decision in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621, was unreasonable in a variety of ways. Specifically, Brown contends that the District Court abused its sentencing discretion by (1) failing to consider properly the factors listed at 18 U.S.C § 3553(a) or articulate a statement of reasons for the sentence pursuant to 18 U.S.C. § 3553(c), (2) improperly calculating the loss for which he was responsible under Section 2B1.1 of the Sentencing Guidelines, and (3) wrongly denying his motion for a downward departure based on his medical condition.

1. *The Sentencing Proceedings*

Following Brown's conviction, the Probation Office submitted a presentence report ("PSR") to the District Court. The PSR calculated Brown's base offense level at 6, but then included a 16-level enhancement based on the amount of financial loss for which Brown was responsible, calculated to be $38,113,383; a 2-level enhancement because the offense involved more than minimal planning; a 4-level enhancement because Brown was an organizer and leader of the conspiracy to obstruct justice; a 2-level enhancement for abuse of a position of trust; and a 2-level enhancement for obstruction of justice. Accordingly, the PSR calculated Brown's total offense level at 32, with a corresponding sentencing range of [illegible]-151 months.

Brown filed objections to the PSR on the grounds that the loss calculation was incorrect and that the enhancement for an aggravated role in the offenses was improper.*524 Brown also filed two motions for downward departures based on his extraordinary civic and charitable contributions and on his age and physical condition. After holding two days of evidentiary hearings, the District Court entered a Memorandum Opinion discussing sentencing issues on August 17, 2004. *See United States v. Brown*, 338 F.Supp.2d 552 (M.D.Pa.2004).

In that opinion, the District Court concluded that, in light of the Supreme Court's decision in *Blakely*, the mandatory application of the Sentencing Guidelines to Brown's case was unconstitutional. The Court nevertheless used the Sentencing Guidelines as a "measuring point" for its analysis, but stated that it would base its ultimate sentencing determination on an "indeterminate scheme in accordance with the

principles set forth" by a decision of the United States District Court for the District of Utah in *United States v. Croxford,* 324 F.Supp.2d 1230 (D.Utah 2004).[30] *Brown,* 338 F.Supp.2d at 555-56. The Court stated it would not issue an "alternative Guidelines sentence," but it nevertheless addressed Brown's challenges to the PSR, overruling his objections and denying his motions for downward departure. *Id.* at 556-62. With respect to the loss calculation, the District Court accepted over Brown's objection the PSR's use of an "average selling price methodology" for determining the amount of shareholder loss that resulted from Brown's fraud, noting that other courts had sanctioned this method of loss calculation in recent accounting fraud decisions. *Id.* at 557 (citing *United States v. Snyder,* 291 F.3d 1291 (11th Cir.2002); *United States v. Bakhit,* 218 F.Supp.2d 1232 (C.D.Cal.2002); *United States v. Grabske,* 260 F.Supp.2d 866 (N.D.Cal.2002)). Brown urged reliance on his expert, who conducted "an event study, which measures the out-of-pocket damages to investors by calculating the difference between the fraudulent mis-pricing in the price paid for the security and the inflation in the sales price," and calculated that there

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[30] The court in *Croxford* held that application of the Guidelines would be unconstitutional pursuant to *Blakely,* and thus it approached the sentencing determination "as the courts handled sentencing before the Guidelines-by making a full examination of the relevant evidence and imposing an appropriate sentence within the statutory range set by Congress." 324 F.Supp.2d at 1246. The *Croxford* court nevertheless determined what the sentencing range would be under the Guidelines and looked to that range for guidance. *Id.* at 1248-49.

was no shareholder loss attributable to Brown's fraud. *Brown,* 338 F.Supp.2d at 558.

As described by the District Court, the average selling price method "attempts to estimate the effect inflated earnings had upon the value of the company's shares by comparing the average selling price of the stock during the lifetime of the fraud to the average selling price after the fraud was disclosed or corrected via a restatement." *Id.* at 557 (citing *Bakhit,* 218 F.Supp.2d at 1241). "Once an average loss per share has been established, it is multiplied by the number of harmed shares to estimate the total shareholder loss." *Id.* (citing *Bakhit,* 218 F.Supp.2d at 1242). To calculate the loss attributable to Brown's misconduct, the Court's methodology looked at six-, seven-, and eight-day windows before and after **Rite** Aid's October 18, 1999 announcement that it intended to restate its income. The average losses per share over these three time periods then were multiplied by the total number of "innocent shares" (the total number of shares minus those held by the Rite Aid defendants), reduced by the percentage of the total fraud for which Brown was responsible. The separate figures for the ***525** six-, seven-, and eight-day windows then were averaged to arrive at the final loss figure.[31]

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[31] It is unclear why the District Court focused solely on averages of arbitrary multi-day windows surrounding the October 18, 1999 announcement, given that Rite Aid's stock price was in a period of continuous decline both before and after this date, and that the effect of Brown's fraud on Rite Aid's stock price began at least as early as June 1, 1999, when Rite Aid reported its income for fiscal year 1999 to the SEC. Under a typical average selling price approach to loss calculation, sometimes referred to

Although the District Court accepted the PSR's methodology, it did disagree with the PSR's loss calculation in two respects, as it found that the amount of loss attributable to Brown's fraud should be discounted by a dividend Rite Aid paid to its shareholders on October 14, 1999, and that the government overestimated the number of shares harmed by Brown's fraud. After accounting for these adjustments, the Court determined that the amount of loss for which Brown was responsible was $23,170,452. The Court noted that this revision of the loss amount would not affect Brown's sentencing range under the Sentencing Guidelines, as his overall offense level remained at 32.[32]

The District Court denied Brown's motion for a downward departure based on his medical condition

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as a "rescissory" or "modified rescissory" approach, a court will calculate the average selling price of the security over the entire life of the fraud (the "average fraud price") and the average selling price during a period-often several weeks or more-following the fraud's revelation (the "average post-fraud price") then subtract the average post-fraud price from the average fraud price. The resulting loss per share then is multiplied by the number of affected shares to derive the total loss figure. *See Bakhit*, 218 F.Supp.2d at 1240-42; *Kevin P. McCormick, Untangling the Capricious Effects of Market Loss in Securities Fraud Sentencing*, 82 Tul. L.Rev. 1145, 1165-66 (2008); Samuel W. Buell, *Reforming Punishment of Financial Reporting Fraud*, 28 Cardozo L.Rev. 1611, 1635-36 (2007).

[32] Brown also objected to the PSR's loss calculation including amounts from rebate and settlement agreements that Rite Aid fraudulently had listed as income in its financial disclosures, and to the amount of loss attributable to the backdated severance letters. Additionally, Brown objected to the 4-level offense level enhancement based on his aggravated role. The District Court overruled all of these objections.

because it concluded that Brown "did not meet his burden of establishing that the Bureau of Prisons could not provide appropriate medical care for a person of [Brown]'s age and physical condition." *Brown,* 338 F.Supp.2d at 562. The Court likewise denied Brown's motion for a downward departure based on his charitable and civic contributions, finding that although Brown was generous in these regards, his contributions were not extraordinary given his financial means.

The District Court imposed Brown's sentence at a hearing on October 14, 2004. At the hearing, the Court rejected additional sentencing objections that Brown raised with respect to his vulnerability to abuse and his medical condition. The Court noted with respect to Brown's medical condition that many defendants have similar problems and, in its experience, the federal prison system was very capable of dealing with defendants in Brown's situation. The Court also addressed Brown's charitable deeds, and, although it already had rejected his motion for a downward departure predicated on those deeds, the Court stated that Brown's "good deeds are very much acknowledge[d] ... and I believe that is addressed in the sentence that will be given." App. at 94-95. The Court then sentenced Brown to a term of imprisonment of 120 months, one month below the minimum Guidelines range.

***526** 2. *Post-Booker Sentencing Requirements*

In considering a challenge to a district court's sentencing decision, we engage in two levels of review. First, we must ensure that the district court did not commit a significant procedural error in arriving at

its decision, "such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence-including an explanation for any deviation from the Guidelines range." *United States v. Wise,* 515 F.3d 207, 217 (3d Cir.2008) (quoting *Gall v. United States,* 552 U.S. 38, 51, 128 S.Ct. 586, 597, 169 L.Ed.2d 445 (2007)). We review alleged factual errors for clear error but exercise plenary review over "purely legal" errors, such as a misinterpretation of the Guidelines or the governing case law. *United States v. Arrelucea-Zamudio,* 581 F.3d 142, 145 (3d Cir.2009). Second, if we determine that there has not been a significant procedural error, we review the ultimate sentence imposed to determine if it was substantively reasonable under an abuse of discretion standard. *Wise,* 515 F.3d at 218 (citing *Gall,* 552 U.S. at 51, 128 S.Ct. at 597).

As we have indicated, the District Court imposed Brown's sentence after the Supreme Court's decision in *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, but prior to its decision in *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621. In similar circumstances in other cases, we have remanded the case for resentencing unless the district court followed the procedures required after *Booker. See United States v. Corley,* 500 F.3d 210, 221 (3d Cir.2007), *vacated on other grounds,* --- U.S. ----, 129 S.Ct. 1558, 173 L.Ed.2d 443 (2009). We have held that these procedures require that in setting a sentence a district court must (1)

calculate the applicable Guidelines range, (2) formally rule on any departure motions, and (3) exercise its post-*Booker* discretion by considering the factors in 18 U.S.C. § 3553(a) in setting the sentence it imposes regardless whether it varies from the sentence calculated under the Guidelines. *United States. v. Olhovsky,* 562 F.3d 530, 546-47 (3d Cir.2009).

3. *Unreasonableness of the Sentence*

Following *Blakely,* a district court must consider the factors that 18 U.S.C. § 3553(a) enumerates before sentencing a defendant. Those factors include the nature and circumstances of the offense, the history of the defendant, and the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. Additionally, the court must impose a sentence sufficient, but not greater than necessary, to reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense, afford adequate deterrence to criminal conduct, protect the public from the defendant's further crimes, and provide the defendant with needed treatment, training, or care.

"While sentencing courts need not discuss each of the § 3553(a) factors if the record makes clear the court took the factors into account in sentencing, where ... the record strongly suggests that some of the statutorily prescribed sentencing factors were ignored, we cannot conclude that the resulting sentence was reasonable." *Olhovsky,* 562 F.3d at 547 (internal quotation marks and citation omitted); *see also United States v. Tomko,* 562 F.3d 558, 567 (3d Cir.2009) (en banc) ("In the wake of *Booker,* it is essential ...

that district *527 courts provide courts of appeals with an explanation sufficient for [them] to see that the particular circumstances of the case have been given meaningful consideration within the parameters of § 3553(a).") (internal quotation marks and citation omitted). Here the District Court, based on the Supreme Court's reasoning in *Blakely,* correctly determined that the mandatory application of the Guidelines to Brown's sentence would be unconstitutional. The Court, however, being conducted by a judge not a prophet, was unable precisely to predict the effect that the Supreme Court's eventual holding in *Booker* would have on federal sentencing. Lacking this clairvoyance the Court failed to explain, in the manner now required, how it considered the factors listed in section 3553(a) in imposing Brown's sentence. For this reason, we must remand the case to the District Court for resentencing. Because we remand for resentencing on this ground, we express no opinion on Brown's remaining sentencing arguments which, of course, he can advance at his resentencing.[33]

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[33] With respect to the District Court's loss calculation, however, we note that the legal landscape has changed somewhat since the time of Brown's sentencing. Notably, two courts of appeals explicitly now have applied the loss calculation principles that the Supreme Court has required in civil securities fraud cases, *see Dura Pharmaceuticals, Inc. v. Broudo,* 544 U.S. 336, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005), in the criminal sentencing context, *United States v. Rutkoske,* 506 F.3d 170, 179-80 (2d Cir.2007); *United States v. Olis,* 429 F.3d 540, 546-49 (5th Cir.2005), another has opined that such an application would be appropriate, *United States v. Nacchio,* 573 F.3d 1062, 1078-79 (10th Cir.2009), and a fourth has held that although a sentencing court need not follow *Dura Pharmaceuticals's* loss causation

V. CONCLUSION

For the reasons we set forth above, we will affirm the judgment of conviction but will vacate the sentence entered by the District Court on October 15, 2004, and we will remand the case for resentencing in accordance with this opinion. We will affirm the order denying Brown's motion for a new trial entered by the District Court on August 10, 2005, and the order denying Brown's renewed motion for a new trial or for dismissal of the indictment entered by the District Court on February 22, 2008.

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approach, it nevertheless must determine "how much of the shareholders' loss was *actually caused* by [defendant]'s fraud." *United States v. Berger*, 587 F.3d 1038, 1046 (9th Cir.2009) (emphasis added).

APPENDIX B

239 F.Supp.2d 535

United States District Court,
M.D. Pennsylvania.
UNITED STATES of America
v.
Martin L. GRASS Franklin C. Brown
No. CRIM.1:CR-02-146-01, CRIM.1:CR-02-146-02.

Jan. 13, 2003.

MEMORANDUM

RAMBO, District Judge.

On June 21, 2002, a federal grand jury sitting in Harrisburg, Pennsylvania issued a thirty-seven count indictment against Defendants Grass and Brown, former officers and directors for the Rite Aid Corporation.[1] The indictment alleges that Defendants engaged in a conspiracy intended to enrich themselves by defrauding Rite Aid and its stockholders, creditors, and vendors. This conspiracy allegedly lasted the duration of Defendant Grass's tenure as Rite Aid's Chief Executive Officer ("CEO"). The indictment also alleges that Defendants Grass and Brown en-

[1] The indictment also contains charges against a current Rite Aid Vice President, Eric Sorkin, and Rite Aid's former Chief Financial Officer, Franklyn Bergonzi. However, neither Bergonzi, nor Sorkin, are parties to this motion.

gaged in a conspiracy to obstruct justice by impeding investigations by the United States Securities and Exchange Commission ("SEC"), the Federal Bureau of Investigation ("FBI"), the United States Attorney's Office for the Middle District of Pennsylvania, and the Grand Jury.

On September 4, 2002, Defendants Grass and Brown filed a motion to suppress tapes of conversations that they had with Timothy Noonan, Rite Aid's former President. Defendants contend that Assistant United States Attorney Kim Douglas Daniel obtained the recorded conversations in violation of Rules 4.2 and 8.4(a) of the Pennsylvania Rules of Professional Conduct. Following the submission of briefs, the court conducted a suppression hearing on December 20, 2002. The motion is now ripe for disposition.

I. *Findings of Fact*

Most of the facts pertinent to this motion are not in dispute. Defendant Grass resigned as Rite Aid's CEO on October 18, 1999. Shortly thereafter, Rite Aid's new corporate leadership launched an internal investigation into allegations of fraudulent misconduct during Defendant Grass's tenure as CEO. In December of 1999, the SEC launched its own civil investigation into these same allegations. Around that same time, the FBI's field office in Harrisburg, Pennsylvania began an investigation in conjunction with the United States Attorney's Office for the Middle District of Pennsylvania. The Government assigned FBI Agent George Delaney and Assistant United States Attorney ("AUSA") Kim Douglas Daniel to lead its criminal investigation.

At the suppression hearing, Noonan testified that between October of 1999 and July of 2000 he met with Defendant Brown several times. During those meetings, the two men discussed what each would tell Rite Aid's internal investigators regarding the fraud allegations. Both men were aware, during this period, that both civil and criminal investigations were pending as well.

On February 12, 2001, AUSA Daniel phoned Defendant Brown's counsel at the time, Herbert Stern.[2] During that conversation,***537** the two agreed that the Government would interview Defendant Brown on April 4, 2001. Mister Stern, however, requested that the Government provide, in advance of the interview, an agenda listing the topics that would be discussed. On March 28, 2001, AUSA Daniel faxed Mr. Stern an agenda letter setting forth the topics that the parties would discuss during the interview. No later than March 30, 2001, Mr. Stern informed AUSA Daniel that Defendant Brown had changed his mind and would not consent to an interview.

Previously, on March 9, 2001, Noonan met with AUSA Daniel and Agent Delaney at the United States Attorney's Office in Philadelphia, Pennsylvania. During that meeting, the parties discussed the fraud allegations and any contact that Noonan may have had with Defendants Grass and Brown subsequent to Noonan's departure from Rite Aid in De-

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[2] Herbert Stern is a former United States District Court Judge for the District of New Jersey. Hereinafter the court will refer to Judge Stern as "Mr. Stern" in order to avoid confusion between his title as a federal judge and his role as counsel in the instant matter.

cember of 1999. The following day, Defendant Brown called Noonan at his home requesting that the two meet. Noonan deferred the meeting until March 13, 2001. In the meantime-on either March 11 or March 12, 2001-Noonan contacted Agent Delaney and informed him of Brown's phone call.

On March 13, 2001, Noonan met with Agent Delaney and an unidentified FBI "technical person." (Transcript of Suppression Hearing, Dec. 20, 2002 [hereinafter "Tr."] at p. 24, Ins. 8-9.) During that meeting, Noonan agreed to surreptitiously record his conversation with Brown. In preparation for the meeting, Agent Delaney instructed Noonan to steer the conversation with Defendant Brown towards the same subjects listed on the Government's agenda letter to Brown's attorney. After his meeting with Agent Delaney, Noonan met with Defendant Brown at a restaurant in Mechanicsburg, Pennsylvania. Their conversation was recorded by a hidden microphone attached to Noonan's body. During that meeting, Defendant Brown informed Noonan that he would be meeting with the Government in early April. Defendant Brown also told Noonan that Defendant Grass had retained Attorney William Jeffress to represent him in any criminal proceedings that might occur.

Between March 13 and March 30, 2001, Noonan met again with Agent Delaney in Philadelphia. At some point, either during the meeting in Philadelphia or during a subsequent phone conversation, the two discussed several issues related to the Rite Aid investigation and whether Noonan was willing to become an undercover agent for the Government. Noonan agreed. Agent Delaney then instructed Noonan to

meet with Defendant Brown again and to engage him in conversations relevant to the fraud allegations. Agent Delaney also gave Noonan a fake letter signed by AUSA Daniel and addressed to Attorney David Howard, Noonan's retained counsel. That document was similar in content to the agenda letter that AUSA Daniel had already sent to Mr. Stern regarding Defendant Brown's proposed interview. Agent Delaney instructed Noonan to use the letter as a prop to guide his conversation with Brown to the topics listed in the letter. However, Agent Delaney warned Noonan to avoid talking about Defendant Brown's conversations with his attorney. (*See* Tr. at p. 44, lns. 6-9 ("[Agent Delaney] did say that if Franklin brought up or said he had this discussion with his attorney or that discussion or that these were topics that his attorney said, don't get into those conversations.").)

***538** After this meeting, Noonan called Brown and told him that he wanted to get together and talk on March 30, 2001. As stated above, by March 30, 2001, Brown's attorney had cancelled the Government's interview of Defendant Brown. In any event, Noonan met Defendant Brown on March 30, 2001 at a different restaurant in Mechanicsburg. During their conversation, Noonan, as instructed, showed Defendant Brown the prop letter and attempted to engage him in conversation regarding the subjects listed in the letter. As with their meeting on March 13, 2001, Noonan wore a wire that recorded the conversation.

On April 1, 2001, Defendant Brown called Noonan and "said that he wanted to get together." (Tr. at p. 18, ln. 14.) Noonan agreed and immediately called Agent Delaney who arranged to have Noonan wired.

Noonan then met with Brown again and, as before, recorded their conversation for the Government.

On either April 16 or April 18, 2001, Noonan, at Agent Delaney's behest, traveled to Defendant Grass's office in Lemoyne, Pennsylvania to attempt to record a conversation with Grass regarding the fraud allegations.[3] Defendant Grass, however, was not in his office.

Following this attempted meeting, Noonan met once again with Agent Delaney in Philadelphia. During this meeting, Delaney instructed Noonan to meet with Defendant Brown again to arrange for a meeting with both Defendants Brown and Grass. On April 27, 2001, Noonan and Defendant Brown met at the Hampden Center Shopping Mall in Mechanicsburg, Pennsylvania. As before, Noonan recorded the conversation. During the course of the meeting, Noonan, as instructed, requested an audience with Defendant Grass. Defendant Brown indicated that Defendant Grass would probably be amenable to such a meeting.

On May 1, 2001, Noonan met with Agent Delaney, another unidentified FBI agent, AUSA Daniel, and AUSA George Rocktashel at the Federal Building in Harrisburg. Although AUSA Daniel was aware of Noonan's cooperation, this marked the first time he and Noonan had spoken since Noonan's initial inter-

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[3] As he did before Noonan's meeting with Defendant Brown, Agent Delaney instructed Noonan to stay clear of the substance of Defendant Grass's conversations with his attorney. (*See* Transcript at p. 60, lns. 15-18 ("[Agent Delaney] said if they start talking about their lawyers or conversations with their lawyers, I don't want you to get into any conversation. He said that to me.").)

view on March 9 in Philadelphia. Their conversation covered a wide variety of subjects relating to the Government's investigation of fraud at Rite Aid and what Noonan's conversations with Brown had unveiled. Noonan also informed AUSA Daniel that he would soon be meeting with both Defendants Grass and Brown. AUSA Daniel then delineated the topics that he wished to have Noonan raise during that meeting. Following his two to three hour meeting with the Government officials, Noonan jotted down on a sheet of paper notes regarding what topics AUSA Daniel wanted Noonan to discuss with Defendants Brown and Grass.

The following day, May 2, 2001, Noonan met with Defendants Grass and Brown at Grass's office. Once again, the Government recorded the conversations through a hidden microphone worn by Noonan. During the course of this meeting, Noonan removed his notes from his pocket and used them to guide the conversation. Noonan told Defendants Grass and Brown that the notes were taken during Noonan's meeting with the Government in Philadelphia in March of 2001. Following the ***539** meeting with Grass and Brown, Noonan met with AUSA Daniel. Noonan subsequently threw the notes away.

After the May 2, 2001 meeting, Defendant Brown called Noonan and stated: "That he would like to get together." (Tr. at p. 78, ln. 15.) Noonan and Brown met for the last time on May 21, 2001. As with the other conversations, the Government surreptitiously recorded this conversation through a wire that Noonan was wearing.

Although AUSA Daniel only met with Noonan twice, he approved the recording of each conversation. It is undisputed that at the times he authorized these recordings, AUSA Daniel knew that Defendants Grass and Brown were both represented by counsel. Additionally, it is likewise beyond dispute that, at least with respect to five of the six conversations, AUSA Daniel knew that Defendant Brown had refused to consent to an interview with the Government. Finally, it is also undisputed that neither Defendant was under indictment at the time Noonan recorded their conversations. As stated at the outset of this memorandum, the indictment in this case did not issue until June 21, 2002.

II. ***Conclusions of Law***

In the instant motion, Defendants argue that AUSA Daniel violated Rules 4.2 and 8.4(a) of the Pennsylvania Rules of Professional Conduct by using a surrogate to communicate with parties whom he knew to be represented by counsel. Thus, according to Defendants, the tapes of these conversations should be suppressed pursuant to the court's inherent supervisory power. For the following reasons, the court will deny Defendants' motion: (1) AUSA Daniel did not violate the Rules of Professional Conduct; and (2) even if he did violate those rules, suppression of the evidence is not an appropriate remedy under the facts in this case.

A. ***AUSA Daniel did not violate the Pennsylvania Rules of Professional Conduct.***

Rule 4.2 of the Pennsylvania Rules of Professional Conduct, also known as the "no-contact rule," prohibits an attorney from communicating "about the sub-

ject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." Rule 8.4(a) states that it is professional misconduct for an attorney to knowingly assist another in violating the rules of professional conduct. Defendants argue that the tapes of the conversations between Noonan and Defendants must be suppressed because AUSA Daniel violated Rule 4.2. According to Defendants, AUSA Daniel employed Noonan as his surrogate to communicate with Defendants after AUSA Daniel knew that Defendants had retained counsel; thus, violating Rule 8.4(a).

In order to prevail on this motion, Defendants must demonstrate the following. First, AUSA Daniel violated Rule 4.2. Second, Defendants were represented by counsel at the time the statements were elicited. Third, suppression is an appropriate remedy for violation of the Rule. *See United States v. Veksler,* 62 F.3d 544, 548 (3d Cir.1995).

In the past, significant debate surrounded the issue of whether state rules of professional responsibility apply at all to federal prosecutors. *See United States v. Talao,* 222 F.3d 1133, 1139-40 (9th Cir.2000). However, in 1998, Congress eliminated all doubt regarding this issue by enacting what is commonly referred to as the McDade Amendment. *See* 28 U.S.C. § 530B. The McDade Amendment states, in relevant part: "An attorney for the [Federal] Government shall be subject to ***540** State laws and rules ... governing attorneys in each State where such attorney engages in that attorney's duties, to the extent

and in the same manner as other attorneys in that State." *Id.* at § 530B(a).

Therefore, it is beyond doubt that AUSA Daniel was bound by the Pennsylvania Rules of Professional Conduct at all times relevant to the instant motion.[4] Furthermore, based on Rule 8.4(a) of the Rules of Professional Conduct, AUSA Daniel could not avoid the dictates of Rule 4.2 by employing Noonan as his surrogate to accomplish what he himself could not do without violating the Rules of Professional Conduct. However, it remains to be seen whether AUSA Daniel's conduct in this case violated Rule 4.2. Although the McDade Amendment makes clear that state rules of professional conduct apply to Government attorneys, that legislation does not define what those standards are, when they attach, or what is an appropriate remedy to impose if Government lawyers breach those rules. Instead, it is completely silent as to these matters.

The Government argues that AUSA Daniel did not violate Rule 4.2 because (1) neither Defendants Grass, nor Brown, were a "party," as no indictment had issued at the time Noonan recorded the conversations, and (2) even if either Defendant Grass or Brown were a "party," the communications were "authorized by law," as that term is used in the no-contact rule. Pa. R. Prof'l Conduct 4.2. In support, the Government cites the Third Circuit's decision in *United States v. Balter,* 91 F.3d 427 (3d Cir.1996). In

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[4] The Pennsylvania Rules of Professional Conduct are applicable to all actions brought in the United States District Court for the Middle District of Pennsylvania. *See* M.D. Pa. Local Rule 83.23.2.

this pre-McDade Amendment case, the Third Circuit affirmed the District Court's refusal to suppress recordings of non-custodial conversations between a Government agent and the defendant made after the Government learned that the defendant was represented by counsel. *Id.* at 436.

The Circuit Court's holding in that case was based on the identical two-prong argument that the Government proffers in opposition to the instant motion. That is, first, the court held that the Government did not violate the no-contact rule because the agent recorded the conversations prior to the defendant's indictment. Therefore, at that time, the defendant was not a party. *See id.* Second, even if the defendant were a party, the court held that the communications fell within Rule 4.2's "authorized by law" exception. *See id.*

It is important to note that, in *Balter,* the court addressed whether the Government violated the no-contact rule as that rule appears in the New Jersey Rules of Professional Conduct. Crucial to the court's holding that the defendant was not a "party," as that term is used in the rule, was the fact that courts interpreting the New Jersey no-contact rule had concluded that it does not attach until after initiation of formal legal or adversarial proceedings. *See id.; see also State v. CIBA-GEIGY Corp.,* 247 N.J.Super. 314, 589 A.2d 180, 183 (App.Div.1991) (holding that a criminal suspect is not a party until "after formal legal or adversarial proceedings have commenced"). This portion of the *Balter* holding is, therefore, inapplicable to the instant case. Although the Pennsylvania and New Jersey no-contact rules employ virtually

identical language, there is no caselaw limiting application of the Pennsylvania no-contact rule to post-indictment contacts. In fact, the commentary to Pennsylvania Rule 4.2 states the contrary: "This Rule covers any person, whether or not a party ***541** to a formal proceeding, who is represented by counsel concerning the matter in question." Pa. R. Prof'l Conduct 4.2 official comment. Therefore, it is clear that, at the time of the recorded conversations, Defendants Grass and Brown were parties as that term is contemplated in Rule 4.2 of the Pennsylvania Rules of Professional Responsibility.

However, this does not, as Defendants contend, automatically lead to the conclusion that AUSA Daniel violated the no-contact rule by employing Noonan as his alter ego to communicate with Defendants. Rule 4.2 does not prohibit all contact between attorneys and parties represented by counsel. Rather, that rule specifically makes an exception for those contacts which are "authorized by law." Pa. R. Prof'l Conduct 4.2. In fact, the *Balter* court specifically held that the person-party distinction under the New Jersey no-contact rule was irrelevant to its holding that the Government did not violate the rule because "even if a criminal suspect were a 'party' within the meaning of the rule, pre-indictment investigation by prosecutors is precisely the type of contact exempted from the Rule as 'authorized by law.' " 91 F.3d at 436. Therefore, *Balter* makes clear that pre-indictment non-custodial interrogations by Government agents do not violate the no-contact rule because such contacts are authorized by law.

With the exception of the Second Circuit, every other court of appeals that has considered the issue has similarly held that the no-contact rule does not prevent non-custodial pre-indictment communications by undercover agents with represented parties which occur in the course of legitimate criminal investigations. *See United States v. Ryans,* 903 F.2d 731, 739 (10th Cir.1990) ("We agree with the majority of courts which have considered the question that [the no-contact rule] was not intended to preclude undercover investigations of unindicted suspects merely because they have retained counsel."); *United States v. Sutton,* 801 F.2d 1346, 1366 (D.C.Cir.1986) (citing *United States v. Lemonakis,* 485 F.2d 941, 956 (D.C.Cir.1973) ("Here, in the investigatory stage of the case, the contours of the "subject matter of the representation" by appellants' attorneys, concerning which the code bars "communication," were less certain and thus even less susceptible to the damage of "artful" legal questions the Code provisions appear designed in part to avoid.")); *United States v. Dobbs,* 711 F.2d 84, 86 (8th Cir.1983) ("Assuming that [the no-contact rule applies] ... it does not require government investigatory agencies to refrain from any contact with a criminal suspect because he or she has retained counsel.... [The Government agent's] non-custodial interview of Dobbs prior to the initiation of judicial proceedings against the appellant did not constitute an ethical breach.").[5]

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[5] Although each of these cases was decided prior to the enactment of the McDade Amendment, the court cannot see how their reasoning regarding the "authorized by law" exception to the no-contact rule would be altered by legislation making state

***542** Moreover, such a reading is consistent with the intentions of the authors of the original no-contact rule. The commentary to American Bar Association Model Rule of Professional Responsibility 4.2 states the following:

> Communications authorized by law also include constitutionally permissible investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings, when there is an applicable judicial precedent that either has found the activity permissible under this Rule or has found this Rule inapplicable. However, the Rule imposes ethical restrictions that go beyond those imposed by constitutional provisions.

Model Code of Prof'l Conduct R. 4.2 cmt. 2 (1983).

Because there is caselaw indicating that AUSA Daniel's pre-indictment investigation was permitted pursuant to the no-contact rule, according to the

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rules of professional responsibility applicable to Federal prosecutors. Reading the McDade Amendment to eliminate the "authorized by law" language in the no-contact rule contravenes fundamental principals of statutory construction. *See Connecticut Nat'l Bank v. Germain,* 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992) (holding that the principal canon of statutory construction is that words are to be given their ordinary meaning); *United States v. Menasche,* 348 U.S. 528, 538-39, 75 S.Ct. 513, 99 L.Ed. 615 (1955) (stating that where the statutory language is clear on its face, courts are to give it full force and effect). Therefore, the caselaw interpreting the "authorized by law" language in the no-contact rule applies with as much force today as it did before enactment of the McDade Amendment.

commentary to the Model Rule, his conduct was "authorized by law" so long as it was constitutionally permissible. Defendants do not contend that the Government's actions here violated their Fifth or Sixth Amendment rights to have counsel present. Nor could they present a credible argument regarding either. Noonan's interrogation, if any, did not take place in a custodial setting nor were Defendants compelled to speak to Noonan. Thus, Defendants' Fifth Amendment right to counsel was not implicated. *See Hoffa v. United States,* 385 U.S. 293, 303-04, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966) (holding that a "necessary element of compulsory self-incrimination is some kind of compulsion"); *Miranda v. Arizona,* 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) (holding procedural safeguards are necessary in order to use statements obtained from a criminal defendant during *custodial* interrogation). Additionally, Noonan recorded the conversations with Defendants before the initiation of adversarial proceedings; placing those contacts outside the scope of the Sixth Amendment right to counsel. *United States v. Henry,* 447 U.S. 264, 269, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980) (holding that the Sixth Amendment right to counsel attaches upon the initiation of the " 'critical stages' of the prosecution"). Nor is there any allegation that AUSA Daniel authorized Noonan to engage in more egregious conduct which might constitute a due process violation. *See, e.g., United States v. Twigg,* 588 F.2d 373, 377-78 (3d Cir.1978) (finding violation of due process where law enforcement officials, in the context of an undercover drug investigation, "conceived and contrived" the crime for which the defendant was convicted) Thus, because AUSA Daniel's

conduct did not violate Defendants' constitutional rights, in addition to the fact that there is a significant body of caselaw indicating that such conduct is not prohibited by the no-contact rule, it must be that his conduct was "authorized by law." Pa. R. Prof'l Conduct 4.2.

In support of their contention that AUSA Daniel violated Rule 4.2, Defendants rely primarily on the Second Circuit's decision in *United States v. Hammad,* 858 F.2d 834 (2d Cir.1988). In that case-on facts somewhat similar to those in the instant matter-the court initially rejected the Government's contention that the no-contact rule only applied to the same extent as the Sixth Amendment right to counsel; *i.e.* only upon the initiation of formal legal proceedings. *Id.* at 839 ("[W]ere we to construe the rule as dependent upon indictment, a government attorney could manipulate grand jury proceedings to avoid its encumbrances."). Having determined that the no-contact rule applied to the Government attorney's pre-***543** indictment conduct, the court went on to hold that, normally, the no-contact rule would not serve to prevent the Government from using confidential informants to elicit incriminating statements from parties that the Government knows to be represented by counsel. The court, however, went on to state the following:

> Notwithstanding this holding, however, we recognized that in some instances a government prosecutor may overstep the already broad powers of his office, and in doing so, violate the ethical precepts of [the no-contact rule]. In the present case, for example, the

> prosecutor's use of a counterfeit grand jury subpoena, bearing the purported seal of the district court and the false signature of the Clerk, was an improper and illegitimate stratagem. We will not countenance such a misuse of the name and power of the court. The employment of a specious and contrived subpoena is the sort of egregious misconduct that, even before the 6th amendment protections attach, violates [the no-contact rule]....
>
> Notwithstanding requests for a bright-line rule, we decline to list all possible situations that may violate [the no-contact rule].... As our holding above makes clear, however, use of informants by government prosecutors in a pre-indictment, non-custodial situation, *absent the type of egregious misconduct that occurred in this case,* will generally fall within the "authorized by law" exception to [the no-contact rule] and therefore will not be subject to sanctions.

Id. at 839-40 (emphasis added).

Thus, it appears that the court, in *Hammad,* was more concerned with curbing prosecutorial skullduggeries than it was with preventing the use of government informants to obtain incriminating statements from parties represented by counsel in the pre-indictment non-custodial setting.

Defendants, however, argue that the no-contact rule bars the introduction of the Noonan tapes because "[t]he facts in *Hammad* almost precisely parallel the facts of this case." (Defs. Br. in Sup. Mot. to Suppress Noonan Tapes at 16.) Like the Government attorney in *Hammad,* AUSA Daniel used fake docu-

ments and had his informant falsely indicate to the targets of the investigation that the informant himself was still under investigation. Thus, according to Defendants, "Daniel's actions are clear cut violations of Rules 4.2 and 8.4(a)." (*Id.* at 17.)

The court disagrees both with Defendants' interpretation of the facts in this case and the weight it gives to the *Hammad* decision. Although the Second Circuit, in *Hammad,* held that the use of fake documents places a prosecutor's conduct outside of the authorized by law exception to the no-contact rule, that portion of the *Hammad* decision is inapplicable in the instant matter. First, AUSA Daniel did not employ a counterfeit grand jury subpoena bearing the forged signature of the Clerk of Court as the Government prosecutor in *Hammad* did. Instead, AUSA Daniel simply drew up a fake agenda letter addressed to Noonan's attorney and signed by AUSA Daniel himself. This document was fake only insofar as there was no pending interview between the Government and Noonan scheduled for April of 2001, as indicated in the letter. By the time AUSA Daniel had written this letter, Noonan was already cooperating with the Government. At the hearing, Noonan testified that the Government fabricated the letter for Noonan to use during his meeting with Defendant Brown. Although preparing and presenting such a letter to an unwitting criminal suspect involves a certain level of dishonesty, it certainly does ***544** not rise to the level of employing a sham grand jury subpoena. *See United States v. Murphy,* 768 F.2d 1518, 1529 (7th Cir.1985) ("In the pursuit of crime, the Government is not confined to behavior suitable for the drawing

room. It may use decoys and provide the essential tools of the offense.") Second, even if the court were to find that this practice was equivalent to the prosecutor's actions in *Hammad,* the Third Circuit has long held that the use of a fabricated grand jury subpoena "to protect a cover in an ongoing undercover investigation" does not constitute prosecutorial misconduct. *United States v. Martino,* 825 F.2d 754, 762 (3d Cir.1987). Given that the holding in *Hammad* explicitly relied on the finding of prosecutorial misconduct, the court finds its applicability to the instant matter limited based on the fact that no prosecutorial misconduct occurred here.

Defendants also argue that a finding that AUSA Daniel's conduct in this case is "authorized by law" would allow the exception to swallow Rule 4.2's prohibition against contact with represented parties. Moreover, according to Defendants, such a ruling would eviscerate the purpose of the McDade amendments; that is, making the no-contact rule explicitly applicable to the conduct of Government attorneys. In support of their position, Defendants cite the following passage from *United States v. Lopez,* 765 F.Supp. 1433 (N.D.Cal.1991):

> Were this court to accept the Department's argument in this regard, it is not clear that there would *any* conduct the prosecutor could not undertake, as long as it was pursuant to his or her responsibility to investigate and prosecute crimes. [Department of Justice] attorneys would be exempt from rules adopted by federal courts to govern ethical conduct of

> attorneys practicing before them. This, quite simply, is an unacceptable result.

Id. at 1448 (emphasis in original).

Lopez, however, is readily distinguishable from the facts in this case. That case involved multiple defendants who had already been indicted on various drug charges. Apparently, an attorney for one of Lopez's co-defendants contacted Lopez and encouraged him to engage in plea negotiations with the Government without having his attorney present. Once these protracted negotiations broke down and the Government's conduct came to light, Lopez's attorney withdrew from the case. Lopez subsequently moved to have the indictment dismissed because, he alleged, the Government attorney violated the no-contact rule. *Id.* at 1438-44. The District Court agreed and granted the motion. In doing so, it made two specific holdings. First, attorneys representing the Federal Government are not exempt from state rules of professional responsibility. *See id.* at 1488 ("Without an ethical restraint, a prosecutor's authority to communicate with represented individuals would be virtually limitless."). Second, post-indictment contacts by Government attorneys are not "authorized by law." *See id.* at 1450 ("Given the above discussion, the court finds that [the no-contact rule] ... appl[ies] to DOJ attorneys, at least in the post-indictment phase of criminal investigations and prosecutions."). *But see id.* at 1448 (recognizing that "Department attorneys are authorized to communicate with represented individuals without their attorney only in the pre-indictment context ... and where specific procedural rules authorize the government conduct"). The first of

these holdings is unexceptional after the enactment of the McDade Amendment. The second is irrelevant to the instant matter because it is beyond dispute that Defendants were not indicted until well over a year after Noonan's last recording ***545** took place. Therefore, to the extent Defendants rely on *Lopez* for the proposition that it would impermissibly stretch the no-contact rule to hold that the Government's conduct in this case was authorized by law, the court finds that *Lopez* is neither instructive, nor relevant to that point.[6]

The McDade Amendment's lone function was to make state rules of professional responsibility applicable to the conduct of Government attorneys. That legislation did not state what those rules were, nor did it amend the well-established contours of those rules. Therefore, as it applies in this case, the

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[6] Defendants also rely on the District of New Mexico's lengthy quotation of *Lopez* in support of their contention that construing the no-contact rule to allow pre-indictment non-custodial interrogation with represented parties would sap the McDade Amendment of its power. *See In re Doe,* 801 F.Supp. 478 (D.N.M.1992). However, insofar as that case addresses the no-contact rule, it stands for the singular proposition that the rule applies to Federal prosecutors; a matter beyond debate in the post-McDade Amendment world. *Id.* at 486-87. Even if the court were to import from this holding that *Doe* stands for the broader proposition that pre-indictment non-custodial contacts by undercover Government agents violates the no-contact rule, such a holding would be mere *dicta*. The court in *Doe* did not make a finding of unethical conduct on the part of the Government attorney which necessitated sanctioning the attorney by, for example, suppressing evidence or dismissing an indictment. Instead, the court merely granted the State of New Mexico's motion to remand the action to the Disciplinary Board of the New Mexico State Supreme Court. *Id.* at 489.

McDade Amendment makes it clear only that Rules 4.2 and 8.4(a) applied to AUSA Daniel's conduct. Those rules prohibit attorneys, or their agents, from contacting parties that are represented by counsel unless such contact is authorized by law. As previously stated, AUSA Daniel's conduct was authorized by law and, thus, did not violate the Pennsylvania Rules of Professional Conduct. Defendants, however, contend that such a reading would allow the exception to swallow the rule, thus weakening the purpose behind the McDade Amendment. However, Defendants fail to recognize that the exception is part and parcel of Rule 4.2. Therefore, the McDade Amendment made the entire Rule 4.2, including the authorized by law exception, applicable to the conduct of Government attorneys. To adopt Defendants' argument would be tantamount to reading the McDade Amendment as amending all fifty states' rules of professional responsibility as they apply to Government attorneys. Absent a clear indication from Congress that it intended to do so, the court will not read such an awesome power into the McDade Amendment's humble command that attorneys for the Government "shall be subject to State laws and rules ... governing attorneys in each State ... to the extent and in the same manner as other attorneys in that State." 28 U.S.C. § 530B(a).

Moreover, reading the McDade Amendment according to Defendants' interpretation raises serious public policy concerns regarding the fairness of the judicial system. It is axiomatic that criminal defendants' trial rights should not depend on the extent of their financial resources. *See, e.g., Powell v. Alabama,* 287 U.S. 45, 65, 53 S.Ct. 55, 77 L.Ed. 158

(1932) (holding, *inter alia,* that appointment of counsel for impecunious defendants is necessary to comply with requirements of due process). Yet, adopting a rule that the McDade Amendment prohibits the Government from contacting any person known to be represented by counsel in any way whatsoever, will insulate from undercover investigation any defendant with enough financial resources to permanently obtain private counsel. Such a rule would dramatically ***546** impugn the integrity of the judiciary; not to mention the crippling effect it would have on the Government's ability to investigate on-going criminal activity. Although Defendants argue that such a contention is irrelevant, it would ignore reality to deny the very real consequences that Defendants' interpretation would have on the day-to-day administration of justice.

B. ***Assuming that AUSA Daniel violated the no-contact rule, suppression of the Noonan tapes is an inappropriate remedy.***

Even assuming that the court were to find that AUSA Daniel violated Rule 4.2 of the Pennsylvania Rules of Professional Conduct, the court doubts that suppression of the Noonan tapes is a proper remedy for such a violation. The Supreme Court first countenanced the exclusion of otherwise relevant and probative evidence as a remedy for police conduct that violated a criminal defendant's Fourth Amendment rights. *See Weeks v. United States,* 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914); *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). In this line of cases, the Court found that "the [exclusionary] rule's prime purpose is to deter future unlawful

police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." *United States v. Calandra,* 414 U.S. 338, 347, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). The Court, however, has "consistently recognized that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury." *United States v. Payner,* 447 U.S. 727, 734, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980). Thus, the exclusion of otherwise admissible evidence is sanctioned only where the need to curb Government misconduct outweighs the public's very substantial right to every man's evidence. *Elkins v. United States,* 364 U.S. 206, 216, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960) ("[A]ny apparent limitation upon the process of discovering truth in a federal trial ought to be imposed only upon the basis of considerations which outweigh the general need for untrammeled disclosure of competent and relevant evidence in a court of justice.").

In addition to its power to exclude evidence as a remedy for constitutional violations, the Court has long endorsed the idea that federal courts also have the inherent supervisory power to exclude "evidence taken from the defendant by 'willful disobedience of law.' " *McNabb v. United States,* 318 U.S. 332, 345, 63 S.Ct. 608, 87 L.Ed. 819 (1943); *accord Payner,* 447 U.S. at 735 n. 7, 100 S.Ct. 2439; *Elkins,* 364 U.S. at 223, 80 S.Ct. 1437; *Rea v. United States,* 350 U.S. 214, 216-17, 76 S.Ct. 292, 100 L.Ed. 233 (1956). Under their supervisory power, federal courts may exclude evidence even where the Government has not

violated the Constitution. *United States v. Hogan,* 712 F.2d 757, 761 (2d Cir.1983). The supervisory power to exclude evidence, however, should only be imposed to serve three purposes: (1) to remedy violations of a particular defendant's right; (2) to preserve judicial integrity; and (3) to deter illegal or improper conduct on the part of Government attorneys and other law enforcement personnel. *United States v. Hasting,* 461 U.S. 499, 505, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983) (internal citations omitted). Therefore, in order to determine whether exclusion would be proper in this case, the court must determine whether the need to effectuate any of the these purposes outweighs the Government's right to present the Noonan tapes for the jury's consideration at trial. The court, therefore, now turns to Rule 4.2 to examine whether the principals***547** embodied by it would be furthered by suppression of the Noonan tapes.

"Courts and commentators have noted that Rule 4.2 is designed 'to prevent situations in which a represented party may be taken advantage of by adverse counsel; the presence of the party's attorney theoretically neutralizes the contact.' " *University Patents, Inc. v. Kligman,* 737 F.Supp. 325, 327 (E.D.Pa.1990) (quoting *Frey v. Department of Health and Human Servs.,* 106 F.R.D. 32, 34 (E.D.N.Y.1985)). "The prohibition against communication with a represented party thus recognizes the inherent danger in a layperson conducting negotiations with an opposing lawyer and the likelihood that such negotiations would destroy the confidence essential to the attorney-client privilege and hamper

the subsequent performance of the represented party's counsel." *Lopez,* 765 F.Supp. at 1449; *accord United States v. Batchelor,* 484 F.Supp. 812, 813 (E.D.Pa.1980).

Thus, the primary purpose of the no-contact rule is to prevent an attorney from intentionally tricking an opposing party into waiving the protections of the attorney-client relationship; presumably the confidentiality of attorney-client communications and trial strategies. As a result, if the court were to order the suppression of the Noonan tapes, it could do so to remedy Defendants' right to confidentially communicate with their attorneys. The court finds that suppression would not vindicate the confidentiality of Defendants' relationship because Defendants placed the confidentiality in jeopardy by communicating with an independent party.

"The attorney-client privilege protects confidential communications made to an attorney in his or her professional capacity in those instances in which a strict relationship between the attorney and the client exists." *In re Grand Jury (OO-2H),* 211 F.Supp.2d 555, 557-58 (M.D.Pa.2001) (citing *Haines v. Liggett Group, Inc.,* 975 F.2d 81, 94 (3d Cir.1992)). The confidentiality of this relationship is protected "to ensure that a client remains free from apprehension that consultations with a legal adviser will be disclosed." *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.,* 32 F.3d 851, 862 (3d Cir.1994). Such concerns are not implicated where, as in the instant matter, a client voluntarily consults a third party regarding matters essential to the client's case. *See United States v. Moscony,* 927 F.2d 742, 752 (3d Cir.1991)

("It is generally true that if the client intended the matter to be made public, the requisite confidentiality is lacking." (internal quotations omitted)); *see also* Edna Selan Epstein, American Bar Association Section of Litigation, The Attorney-Client Privilege and the Work-Product Doctrine 171 (4th ed. 2001) ("To be privileged, a communication must be made with the intention of being kept confidential.").

The fact that Defendants erroneously believed that they were consulting with a friendly ear, rather than a Government agent, does not change this analysis. Put another way, although Defendants could not have reasonably known that the Government was monitoring their conversations with Noonan, they likewise could not have reasonably believed that they were communicating with their attorneys at the time the three men decided to meet to discuss matters related to the various investigations arising out of their tenures as Rite Aid officers. Defendants waived the confidential nature of this information by divulging it to Noonan because he was not their attorney. Defendants cannot now cry out that the sacrosanct nature of their confidential relationship with their attorneys has been usurped by improper Government stratagem when they themselves intentionally caused confidential information*548 to be divulged to a third party whom they knew was not connected to the defense of any case that might be brought against them.[7] Because the undisputed facts indicate that Defendants demonstrated a willingness to share in-

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[7] It is worth noting that Defendant Brown initiated contact with Noonan and that he made the necessary arrangements for the meeting between himself, Noonan, and Defendant Grass.

formation with a person who was not one of their attorneys, the court cannot say that the Government's conduct caused a violation of Defendants' right to confidentially communicate with their attorneys. Thus, the purpose behind the no-contact rule-*i.e.* the protection of the confidential nature of the attorney-client relationship-would not be vindicated by suppression of the Noonan tapes.[8]

Likewise, the court finds that suppression in this case would do little to deter illegal or improper conduct on the part of Government attorneys.[9] Even if the court were to find that AUSA Daniel violated Rule 4.2-although the court specifically has not done so-it cannot say that his conduct, nor that of his collogues at the United States Attorney's office, was so egregious that the court should punish the Government by preventing it from presenting the fruits of its investigation. Contrary to Defendants' assertion, the facts presented do not "illustrate a deliberate attempt by the prosecutor to flout Rule 4.2 by using informant Noonan as an 'alter ego' to interview Grass and Brown about the facts under investigation." (Defs. Reply Br. at 19.) Rather, the facts indicate that the Government believed, in good faith, that their conduct did not violate Rule 4.2. The McDade Amend-

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[8] Moreover, it is worth noting that the Government took aims to protect Defendants' confidential communications with their attorneys. At least twice, Agent Delancy admonished Noonan to avoid conversations regarding what Defendants had communicated to their lawyers. *See supra* at Part I.

[9] The Government's actions did not involve the court in any tangible manner. Therefore, the court finds that suppression of the Noonan tapes would do nothing to protect the integrity of the judicial system.

ment is a new creature. The breadth of its reach had yet to be tested when the Government came to the not unreasonable conclusion that its long-endorsed investigatory practice of using undercover agents to procure information from represented parties remained unaffected. Even if this assumption turned out to be erroneous, the court cannot say that the Government acted with a willfulness to flout its responsibility to refrain from contacting parties represented by counsel.

In addressing whether exclusion is required for violation of the Fourth Amendment, "[t]he Court has acknowledged that the suppression of probative but tainted evidence exacts a costly toll upon the ability of courts to ascertain the truth in a criminal case." *Payner,* 447 U.S. at 734, 100 S.Ct. 2439 (citations omitted). "As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *Calandra,* 414 U.S. at 348, 94 S.Ct. 613. Accordingly, where a law enforcement official objectively relies in good faith upon misinformation, the deterrent effect of the exclusionary rule is too attenuated to require suppression of otherwise admissible evidence. *See United States v. Leon,* 468 U.S. 897, 922, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) ("We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the ***549** substantial costs of exclusion."); *Michigan v. DeFillippo,* 443 U.S. 31, 40, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979) (denying suppression of evidence obtained in search incident to

arrest made in good faith pursuant to a criminal statute later declared unconstitutional). Additionally, the Court has held that deterrence is an inappropriate justification for sanction "where means more narrowly tailored to deter objectionable prosecutorial misconduct are available." *Hasting,* 461 U.S. at 506, 103 S.Ct. 1974 (holding inappropriate reversal of conviction as sanction for prosecutor commenting on the defendant's silence where prosecutor could be referred to attorney discipline board). Although the majority of these holdings addressed whether suppression is an appropriate remedy for violation of the Fourth Amendment, their reasoning is equally persuasive in the present context. *See Payner,* 447 U.S. at 735-36, 100 S.Ct. 2439 (holding that the standards for excluding evidence pursuant to the Fourth Amendment are identical to those for determining exclusion under the courts' supervisory power, "[i]n either case, the need to deter the underlying conduct and the detrimental impact of excluding evidence remain precisely the same").

When the balancing test is applied to the facts in this case, it becomes clear that suppression would be an unduly harsh remedy. Defendants, not the Government, placed the confidentiality of their relationships with their attorneys in jeopardy by divulging information normally protected by the attorney-client privilege to a third-party. Thus, suppression would not vindicate the confidentiality of the attorney-client relationship. Additionally, the Government relied in good faith on the long line of cases holding that pre-indictment non-custodial interrogation with a party represented by counsel is "authorized by law." The

McDade Amendment's command that state rules of ethics apply to Government attorneys to the same extent as private attorneys, at best, arguably manifests an intention to eliminate the type of practice used by the Government in this case. Therefore, the court finds that even if the McDade Amendment placed the Government's conduct outside the "authorized by law" exception to the no-contact rule, it did not do so with enough clarity to warrant a finding that the Government acted in bad faith. As such, the court will not order suppression of the Noonan tapes because the deterrent effect of suppression would be, at best, minimal. Moreover, an alternative, and more appropriate remedy, would be for an aggrieved party to file a complaint before the Pennsylvania Disciplinary Board. *See Hasting,* 461 U.S. at 506, 103 S.Ct. 1974.

III. ***Conclusion***

In accordance with the preceding discussion, the court will deny Defendants Grass and Brown's motion to suppress the Noonan tapes. The court finds that AUSA Daniel's conduct in this case was "authorized by law," and thus, did not violate Rule 4.2 of the Pennsylvania Rules of Professional Conduct. Alternatively, the court finds that even if the McDade Amendment effectively banned pre-indictment non-custodial undercover interrogation of represented parties by Government agents, the court finds that AUSA Daniel relied in good faith on prior caselaw upholding such practices. Thus, suppression of the Noonan tapes would be unjustified. An appropriate order will issue.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 04-4164, 05-3879, 08-1569

UNITED STATES OF AMERICA

v.

FRANKLIN C. BROWN,

Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Criminal No. 02-cr-00146-2) Honorable Sylvia H. Rambo, District Judge

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SUR PETITION FOR REHEARING

BEFORE: MCKEE, Chief Judge, and SLOVITER, SCIRICA, RENDELL,BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, and GREENBERG*, Circuit Judges

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The petition for rehearing filed by appellant, Franklin C. Brown, in the above captioned matter having been submitted to the judges who participated

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* Judge Greenberg's vote is limited to denying rehearing before the original panel.

in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

BY THE COURT:

/s/ Morton I. Greenberg
Circuit Judge

DATED: May 6, 2010